Date: 20060419

File: 166-02-33816

Citation: 2006 PSLRB 42

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

MEICHLAND OLIVER BLACKBURN

Grievor

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

Indexed as
Blackburn 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: Yvon Tarte, adjudicator

For the Grievor: Himself

For the Employer: John Jaworski, counsel

Heard at Kingston, Ontario, December 14 and 15, 2004, June 6 and 7, 2005, and October 3, 4 and 5, 2005. Written submissions received November 15, 2005, December 19, 2005, January 10, 2006, January 13, 2006, and January 27 2006.

Grievance referred to adjudication

[1] This matter deals with the termination of Mr. Blackburn's employment for cause on January 16, 2004. At the time of his termination, the grievor was employed as a Correctional Officer (CX-1) at Millhaven Institution, a maximum security federal penitentiary.

Prior adjudication decision involving the same parties

[2] Adjudication decision 2003 PSSRB 49 (the Henry decision, Exhibit G-1) was rendered by then Deputy Chairperson Evelyne Henry on June 20, 2003. In the somewhat lengthy recitation of the facts, which the parties indicated was accurate, we are told that the grievor started his employment with the Correctional Service of Canada (CSC) in September 1992. Mr. Blackburn had, prior to that date, been employed as a police officer with the Niagara Regional Police Force (NRPF). In May 1997, the grievor sought a leave of absence from the CSC to take a full-time position with the NRPF. Leave without pay was granted to Mr. Blackburn for a one-year period, commencing on June 2, 1997.

[3] In the spring of 1998, the grievor was accused of assault, assault with a weapon, uttering threats and dangerous driving on two separate occasions. On May 25, 1998, Mr. Blackburn was told in writing by then Warden Kelly that the grievor would not be permitted to return to work at Millhaven until a decision was made on the effect of the criminal charges on his continued employment with the CSC. On July 10, 1998, Mr. Kelly wrote to the grievor to advise that he had to remain on leave without pay pending the resolution of the criminal charges.

[4] On January 10, 2002, the grievor was told in writing that he was to report for work at Millhaven on Monday, February 11, 2002. On February 11, 2002, Mr. Blackburn attended at the institution to request a leave form and apply for indefinite sick leave. On February 21, 2002, the grievor's employment was terminated, effective February 11, 2002. In May 2002, Mr. Blackburn obtained a medical certificate from a Dr. Teodorini, which indicated that the grievor suffered from "Adjustment Disorder" related to the criminal charges that had been brought against him. In June 2003, Mr. Blackburn was reinstated by then Deputy Chairperson Henry.

Representation of the grievor

[5] On the first day of the hearing, Mr. Blackburn was represented by Michel Bouchard, a UCCO-SACC-CSN employee. At the commencement of proceedings on the second day, the grievor advised me that he was dismissing his union representative in order to represent himself. Shortly thereafter, the hearing was adjourned to allow the grievor to prepare himself for the continuation of his case. Upon resumption of the hearing in June 2005, Mr. Blackburn asked for and was granted an order excluding witnesses.

Other grievances

[6] At the hearing, Mr. Blackburn indicated that he had other outstanding grievances dealing with his collective bargaining rights that had not been dealt with by the employer. I indicated that I would extend the time limits to deal with those grievances in order to refer them to adjudication, should he be reinstated in his position at CSC. I also indicated that any such referral would be contingent on the requisite bargaining agent approval.

Summary of the evidence

For the employer

[7] Cynthia Berry, whose curriculum vitae was filed as Exhibit E-1, has been employed with the CSC since November 1992. Over the last few years, she has held several senior positions at the Millhaven Institution. At the time of the hearing in this matter, Ms. Berry held the position of Acting Deputy Warden at Millhaven. As such, her responsibilities have included the management of the institution as well as the management of its human and financial resources.

[8] Ms. Berry has known the grievor since 1992 at which time they both took the same CX training course. As a result of the Henry decision, Mr. Blackburn was to be reintegrated into her work unit.

[9] The grievor and Ms. Berry had telephone conversations on July 16, 18 and 22, 2003 (Exhibit E-3). The topics discussed during these conversations included the Henry decision and the grievor's medical fitness certificate.

[10] On July 24, 2003, Ms. Berry wrote to the grievor (Exhibit E-4) in part as follows:

. . .

> *Currently, you are on authorized sick leave without pay. It is essential that an updated leave request form (attached) be submitted to Millhaven Institution reflecting your current status. If you wish to continue with sick leave (without pay or with pay, using the adjusted sick leave credits) the leave request form must be accompanied with a physician's certificate (attached) indicating that you are not fit to return to work. In the event that you wish to return to work, a physician's certificate is required indicating that you are fit for duty prior to your return. Please submit your updated leave request form and physician's certificate to me by 11 Aug 03.*

. . .

[11] In early August 2003, the grievor faxed to Ms. Berry (Exhibit E-7) an amended sick leave form as well as a copy of the Teodorini medical certificate that he had originally submitted in May 2002. The sick leave request was for an indefinite period.

[12] On August 14, 2003, Ms. Berry wrote to Mr. Blackburn (Exhibit E-8) in response to his request for indefinite sick leave and the re-submission of the Teodorini certificate as follows:

. . .

> *Third, the leave request form indicating authorized sick leave without pay indicates leave for the period 11 Feb 02 to "Indefinite". The leave request must reflect an end date; merely recording "indefinite" is not sufficient. Therefore, you are requested to re-submit a leave request form (attached) to reflect an end date.*
>
> *Fourth, the physician's letter dated 13 May 02 identifies a medical condition, which is related to criminal charges brought against you. However, the physician's certificate does not reflect that you are unfit for duty. You are requested to submit a current physician's letter to substantiate your inability to return to work. In the event that you wish to return to work, a physician's certificate is required indicating that you are fit for duty prior to your return.*

. . .

[13] Again on August 22, 2003, the grievor was asked in writing (Exhibit E-9) to submit, by no later than September 22, 2003, a sick leave form with a specified end

date, a current medical certificate to substantiate his inability to return to work as well as information concerning the status of his criminal conviction appeal.

[14] The next communication between Ms. Berry and the grievor took place on September 15, 2003, when Mr. Blackburn phoned to request a compensation number and to indicate that he was currently on bail. During that conversation the grievor was again reminded that he had to provide an end date for his sick leave request as well as a current medical certificate (Exhibit E-10).

[15] This conversation was followed by a letter dated October 30, 2003, (Exhibit E-11) in which Mr. Blackburn provided his interpretation of the Henry decision as follows:

. . .

> *On June 20, 2003, Deputy Chairperson, Evelyn Henry, stated 'that since I have the right to have my request for sick leave without pay for an indefinite period dealt with fairly, and it was not, ordered that I be granted sick leave without pay until I submit to the employer a certificate from my doctor indicating my doctor, apprised of my work description, confirms that I am fit to return to duty.' Therefore, no certificate needs to be presented to currently show that I am unfit until such time I inform the employer that I am ready to return to work or unless you are requesting or ordering me back to work.*

. . .

[16] Attached to his letter was a signed application for sick leave without pay for approximately 910 days. This leave application is said to have been submitted under protest "because the original has been ordered approved". Mr. Blackburn concluded his letter as follows:

. . .

> ***. . . What is lost here upon you and your staff is that the sick and vacation hours restored are insurable hours and become insurable hours once they are paid and these hours are sufficient hours to qualify if you are not willing to accept the restored work hours as insurable hours. Your continued stalling tactics employed to deprive me of this pay is not only deplorable is*** [*sic*] ***smells of racism.***
>
> *Am I to understand that you are seeking my immediate return to Millhaven to resume working? If so, please be more*

> *clear and put it in writing setting out the reasons for the request and the necessity for a medical certificate.*
>
> [Emphasis in the original]

[17] Ms. Berry and the grievor then spoke on the telephone on November 3, 2003. During this conversation, they repeated their respective positions (Exhibit E-13).

[18] Ms. Berry again wrote to the grievor on November 5, 2003, (Exhibit E-12). That letter contained the following paragraph:

. . .

> *As well, a letter(s) were forwarded (24 Jul, 14 and 22 Aug 03) to your residence requesting the following information and/or application: (1) a re-submission of a leave request form (authorized sick leave without pay) for the period of 11 Feb 02 to a specific end date; (2) a current physician's certificate to substantiate your inability to return to work; it was noted that the previous certificate was dated 13 May 02. To date, this information has not been received. The above information (written) is requested to be received by the institution no later then* [*sic*] *Monday 17 Nov 03. Also, the medical information must be acceptable to the employer and satisfies the employee's performance standards. Failure to comply or report for duty with a physician's certificate indicating that you are fit to perform your duties will be considered "abandonment of position" and shall result in termination for cause.*

. . .

[19] Following a telephone conversation with Mr. Blackburn on November 7, 2003, Ms. Berry again wrote to the grievor (Exhibit E-14):

. . .

> *Just as a follow up: letter(s) were forwarded (24 Jul, 14 and 22 Aug, 05 Nov 03) to your residence requesting the following information and/or application: (1) a re-submission of a leave request form (authorized sick leave without pay) for the period of 11 Feb 02 to a specific end date: (2) a current physician's certificate to substantiate your inability to return to work; it was noted that the previous certificate was dated 13 May 02. To date, this information has not been received. The above information (written) is requested to be received by the institution no later then* [*sic*] *Monday 17 Nov 03. Also, the medical information must be acceptable to the employer and satisfies the employee's performance standards. Failure to comply or report for duty*

> *with a physician's certificate indicating that you are fit to perform your duties will be considered "abandonment of position" and shall result in termination for cause.*
>
> . . .

[20] On November 18, 2003, Ms. Berry received from the grievor a letter dated November 12, 2003, (Exhibit E-15) in which a Dr. Yee reported as follows:

> *This is to confirm that the above named patient was seen in my office today for a physical examination and a medical certificate stating that he is unfit for work at present.*
>
> *The physical examination was completed today. However, due to the fact that I have no history, I am unable to provide Mr. Blackburn with a medical certificate stating that his* [*sic*] *is fit or unfit for work at present. For this reason, I have suggested that Mr. Blackburn return to his family doctor, Dr. I. Teodarini* [*sic*]*, in St. Catherines. Dr. Teodarini* [*sic*] *is better suited to provide Mr. Blackburn with the medical certificate and can make the decision whether or not he is fit for work. Due to these circumstances, I believe that Mr. Blackburn will require an extension to provide the required medical certificate.*

[21] On November 13, 2003, Mr. Blackburn forwarded another letter (Exhibit E-16) to Ms. Berry advising her that he had made an appointment to see Dr. Teodorini on November 28, 2003. He wrote:

> . . .
>
> *I will se him and advise him of my situation with CSC and if, upon hearing my case, he feels I am fit to go back to work, I will sincerely consider it. I may however, seek another opinion to which* [*sic*] *am entitled to. If he deems* [*sic*] *am not fit I will ask him to provide a medical certificate evidencing my lack of fitness, however, he's under no obligation or authority to provide me with one. Further, he may not wish to get involve* [*sic*] *in this matter and refer me and my medical history to another doctor or psychologist either in the Windsor or St. Catharines area.*
>
> . . .

[22] In early December 2003, Ms. Berry again wrote to the grievor (Exhibit E-17) asking him to provide a current medical certificate to substantiate his inability to perform his duties as a correctional officer. Mr. Blackburn was also requested to sign

and return a *Consent to Medical Assessment* form and a *Consent to Release Information* form to allow Health Canada to conduct a fitness to work evaluation.

[23] The documents, as well as several others, were returned to Ms. Berry (Exhibit E-18) on December 18, 2003. The grievor wrote, "I DO NOT CONSENT" and initialled the *Consent to Release Information* document. He crossed out all of the consent text on the *Consent to Medical Assessment* document and wrote on it "WILL ATTEND THE OFFICE OF THE DESIGNATED PHYSICIAN BY HEALTH CANADA IN RESPONSE TO MY EMPLOYER'S REQUEST TO RETURN TO WORK". The form was signed by Mr. Blackburn and dated December 12, 2003.

[24] The documentation referred to in the preceding paragraph was accompanied by a letter dated December 12, 2003, from Mr. Blackburn to Ms. Berry (Exhibit E-19). This rather lengthy letter is reproduced in full:

> *Dear Ms. Berry,*
>
> *I am in receipt of the above correspondence* [the December 2003 letter from Ms. Berry] *that I retrieved from my sister's residence at 2295 Union Street, Windsor, Ontario on December 12, 2003.*
>
> *Given your reply in answer to my response of November 12 and 13, 2003, I respectfully withdraw my termination grievance dated December 3, 2003 since it did not occur for the moment.*
>
> *With respect to Management response to the grievances attached to your correspondence, I have reviewed them and have submitted corresponding transmittal forms to level 3.*
>
> *With respect to your request of me to produce a medical certificate to substantiate my absence from duty, as you put it, is not required under the circumstance. I reiterate, that deputy chairperson E. Henry ordered me off on authorized sick leave without pay effective from February 11, 2002 with no end date and that when I desire to return to active duty I should bring with me a medical certificate substantiating my fitness and that if management chooses to challenge it they can do so in accordance with our collective agreement. Mrs. Henry never ordered or stated that I needed to substantiate my absence from duty every six months or otherwise and to date you have not pointed out the authority you are relying on in making this request for me to comply with. If said authority exist then you need to provide it in order to assist me in making an informed decision on the matter.*

With respect to Management decision to refer me to Health Canada for a medical assessment to determine if am medically fit to work is at this time without justification. I can understand the referral if I had requested a return to work or if you had asked me or ordered me back to work. To date, you have refused on several occasions to either request my immediate return or order my return. Why are you refusing to do either? This is like putting the cart before the horse. If I do comply with the referral and Health Canada determines that I meet the medical requirements of the job as described in the Job Analysis Guidelines, will management immediately bring me back to work without objecting to the report? I need to know this.

In reading and reviewing the "protocol for referral for a Health Canada assessment" that you provided in your correspondence, it states on page 4 under the heading "Role of the Return to Work Advisor" that "Health Canada ***will not*** *conduct the assessment if the employee does not voluntary consent to the assessment. An employee has the right not to consent to the Health Canada Assessment."*

Ms. Berry, in reading you letter to Linda Davidson wherein you request of her to approach Health Canada for a Special Fitness to Work Evaluation, I point out the following:

1) *You have no evidence to support your request that I cannot execute the duties of a CO1 in accordance with the three main dimensions contained in the Performance Standards of a Correctional Officer 1 to which you have highlited.*

2) *You stated that the chronology of events leading to the referral as you describe as nothing to do with my performance as an officer with the Correctional Service of Canada to which you have rightly stated to Ms. L. Davidson.*

3) *A criminal charge is simply that and is not evidence that I cannot execute my duties as a CO1. Further, the act(s) leading up to the charge did not involve violence, injury to the complainant or damage to her property and is unrelated to my responsibilities has a CO1.*

4) *The information you are passing on to Ms. Davidson is inaccurate and incomplete and therefore ia not a reflection of the truth much less the truth.*

5) *You are being disingenuous when you state that I was grant authorized sick leave without pay and that I provide a physician's certificate to substantiate that am not able to perform my duties.*

> 6) *The information you are providing Ms. Davidson with is not related to CSC and furthermore, it does not demonstrate that I have an apparent inability to provide the necessary documentation and perform his duties as a CO1.*
>
> *I do not know what counsel or staff relations officers you are relying on in assisting you in this regard. As such, may I suggest that you not listen to him or her and deal with me above board at all times that will result in an outcome that is more likely to be satisfactory to all parties.*
>
> *In conclusion, the protocol for referral to Health Canada requires three domains that need to be present under the Special Fitness to Work Evaluation, which I need not reiterate. Given that you have no evidence from CSC standpoint or otherwise and you have not asked for my immediate return to work with or without a physician's certificate prior to this referral,* ***I will exercise my right by not voluntary consent to the Health Canada Assessment.*** *Also, I do not consent to release information to Health Canada. I will consider doing so when you have made an offer to return me to work, whether immediately or otherwise. I, at this time will adhere to Deputy Chairperson, E. Henry's decision to remain on sick leave without pay. If this is not acceptable then you can grieve the matter. I note there is no ultimatum attached to your request only a deadline of January 5, 2004.*
>
> *The Niagara Regional Police Service (NRPS) and its police board cannot provide you with my medical file, whether in piecemeal or as a whole and my doctor or the service will not do so without my instructions. I will write to the Chief of Police and the Chairperson of the Board of Commissioners of Policy of the NRPS instructing to them not to provide my medical history to CSC or Health Canada and that failure of them to comply will result in a lawsuit. This is not a criminal investigation.*
>
> [*Sic* throughout]
>
> [Emphasis in the original]

[25] In November 2003, Dr. Teodorini ceased to be the grievor's treating physician. On December 15, 2003, Mr. Blackburn wrote to Dr. Teodorini (Exhibit E-20) in part as follows:

. . .

> *I am disappointed that you have taken this position. I have not done anything to you or put you in any position that would compromise your oath, principle or practice as a doctor. Yes, my situation with NRPS was very stressful which impacted on your time and at times possible stressful for you as well. I did not think however, that it would cause you to resort to your present position. I believe you to be a strong and understanding doctor giving* [*sic*] *your ancestry and racial background and I am at a loss as to what triggered this decision.*
>
> *In any event, I am requesting that you forward my medical file to my family physician, Mr. John C.K. YEE, M.D., who presently resides at 2425 Tecumseh Road East, Suite 214, WINDSOR, Ontario, N8W 1E6. He may wish to speak with you or you may wish to speak with him, however, I would ask that you do not colour me in a unfavourable light. Thank you for your cooperation and assistance.*

[26] Following receipt of these last documents, Ms. Berry discussed Mr. Blackburn's situation with James Marshall, who was the Warden of Millhaven Institution at that time. She also contacted the staff relations section for advice and they suggested that the grievor be terminated for cause. That decision could be made only by Warden Marshall. Following these discussions, Ms. Berry had no further contact with the grievor.

[27] The witness introduced the employer's *Leave Without Pay Policy* (Exhibit E-21), the employer's *Administration of Sick Leave* policy (Exhibit E-22) and extracts from clause 31 of the CX collective agreement dealing with sick leave credits and the granting of sick leave (Exhibit E-23).

[28] During cross-examination by Mr. Bouchard, Ms. Berry indicated that Mr. Blackburn had been terminated because he had failed to provide the necessary medical information concerning his fitness to work and was unwilling to participate in a Health Canada assessment.

[29] Ms. Berry confirmed that the grievor was never ordered or requested to return to work, following the Henry decision, and that the Health Canada assessment process is a voluntary one.

[30] Ms. Berry acknowledged that she informed the grievor in writing on two occasions (Exhibits E-12 and E-14) that:

> [f]*ailure to comply* [with the employer's request for a current medical certificate to justify his continued absence from work] *or report for duty with a physician's certificate indicating that* [he was] *fit to perform* [his] *duties, will be considered "abandonment of position" and shall result in termination for cause.*

[31] At the time of termination, Ms. Berry was aware that the grievor had not yet fully resolved all of his criminal proceedings.

[32] During re-examination, the witness indicated that the grievor had never asked to return to work.

[33] Mr. Blackburn further cross-examined Ms. Berry on June 6 and 7, 2005. The witness acknowledged that the Henry decision had favoured Mr. Blackburn because the employer had failed to properly follow its own rules concerning sick leave and disciplinary investigations.

[34] Ms. Berry indicated that she had never seen the request for stress leave signed by the grievor and dated February 11, 2002 (Exhibit G-2).

[35] The witness repeated the fact that she had, on several occasions, following the Henry decision, asked Mr. Blackburn for a current medical certificate. She reiterated her belief that the Teodorini certificate (Exhibit E-7) did not properly address the grievor's functions as a correctional officer.

[36] Ms. Berry believes that the Henry decision allowed the employer to ask Mr. Blackburn for an updated medical certificate based on his work at the CSC. Following the Henry decision, the employer wanted to have updated leave forms on file to properly document Mr. Blackburn's sick leave situation.

[37] The views of Warden Kelly leading up to Mr. Blackburn's termination in 2002 had no bearing on Ms. Berry's actions in this case. The witness had only the Teodorini certificate on file and wanted updated information.

[38] Ms. Berry discussed the need for an updated medical certificate during telephone conservations with the grievor and did not recall Mr. Blackburn objecting to this request.

[39] The witness asserted that there was a CX-1 position for the grievor at Millhaven had he been fit to return to work. When she took over the Blackburn file, the employer was concerned about the pending criminal charges against the grievor. The pending criminal charges against the grievor, however, had no impact on the employer's decision to terminate his employment nor were the charges considered when the employer decided to request updated medical information.

[40] The employer believes it has the necessary authority to require medical certificates for all sick leave situations, whether the leave granted is with or without pay.

[41] According to the employer, the Henry decision had the effect of reinstating the grievor on leave without pay until June 20, 2003, the date of the decision. Since Mr. Blackburn did not report to work following the issuance of the Henry decision, the employer needed to clarify his situation. Although it took a few days for the employer to get organized, it did ask for a new leave application on July 16, 2003 (Exhibit E-3).

[42] Ms. Berry indicated that she never gave Mr. Blackburn the employer's *Leave Without Pay Policy* and the *Administration of Sick Leave* policy.

[43] During the six months leading up to the grievor's termination, Mr. Blackburn never asked whether his presence was required at work. By the same token, the employer never asked the grievor to return to work.

[44] The employer does not believe that this termination was disciplinary. Mr. Blackburn's employment was terminated because of his failure to provide an updated medical certificate and his refusal to participate in a Health Canada evaluation. Ms. Berry believes that the employer clearly warned the grievor that failure to provide the necessary updated documentation would result in termination for cause (see Exhibit E-12).

[45] At no time did the employer consider Mr. Blackburn's letter of November 12, 2003 (Exhibit G-5) to be a request for an extension of time to obtain an updated medical certificate.

[46] Although the grievor was warned on a few occasions (see, for example, Exhibit E-12) that failure to comply with the employer's requests would be considered

"abandonment of position" resulting in termination for cause, the employer decided not to follow this avenue.

[47] The witness disagreed with Mr. Blackburn's position that the Henry decision authorized the grievor to be off work until his criminal charges had been resolved.

[48] Given the grievor's refusal to participate in a Health Canada medical evaluation, Ms. Berry did not further process the documents. To do so, would have served no purpose since no information would have been available to the employer.

[49] Lorian Dowsett has acted as a return-to-work coordinator for the CSC since March 7, 2005. Prior to that, she had been, for more than 10 years, a compensation coordinator, supervising some 20 compensation consultants at the CSC.

[50] Because of her position, she is familiar with Mr. Blackburn's situation. She was involved in the implementation of the Henry decision as it relates to benefits and leave.

[51] Ms. Dowsett is aware of the work done by Wendy Smith who was a compensation consultant at Millhaven Institution. Ms. Smith was, prior to leaving the CSC, responsible for the grievor's pay and benefits.

[52] Exhibit E-24 is a letter addressed to Mr. Blackburn and signed by Ms. Smith. It provides the grievor with a *Leave Balances and Status* report as well as a claim form for disability insurance, the employer portion having been completed out by Ms. Berry. The grievor never responded to this correspondence.

[53] In cross-examination, Ms. Dowsett acknowledged that Mr. Blackburn was not required to apply for disability insurance nor was there any guarantee that he would have received the insurance had he made a claim.

[54] The *Record of Employment* documents (Exhibits G-7 and G-8) were prepared in consultation with and at the request of Rob Melnick at Human Resources Development Canada.

[55] Pursuant to the relevant CX collective agreement, vacation leave is to be used in the year in which it is earned. Unused vacation leave credits will normally be carried

over to the next fiscal year. Upon termination of employment, outstanding vacation leave credits will be cashed out.

[56] Mr. Marshall was Warden at Millhaven from February 18, 2002, to November 1, 2004. Following receipt of the Henry decision, Mr. Marshall decided that Ms. Berry would be responsible to manage Mr. Blackburn's file. As such, Ms. Berry would be a point of contact for the grievor and would "help get him back to work".

[57] At all material times, Mr. Marshall was kept briefed by Ms. Berry on Mr. Blackburn's case. Given the fact that the grievor was on sick leave without pay following the Henry decision, it was important to assess Mr. Blackburn's fitness to return to work in a highly stressful maximum security environment.

[58] When it became obvious that the grievor would not produce relevant fitness information, the employer decided to seek a Health Canada assessment. Warden Marshall would have welcomed Mr. Blackburn back to Millhaven had the grievor been declared fit for duty by an appropriate medical authority.

[59] In the end and after several months during which Mr. Blackburn repeatedly refused to provide updated medical information, the employer decided to terminate the grievor's employment.

[60] Mr. Marshall acknowledged that the various letters sent to the grievor by the employer did not refer to a specific authority authorizing the employer to demand that Mr. Blackburn provide a precise timeframe for any leave without pay request.

[61] Mr. Marshall explained that Mr. Blackburn was terminated for the sole reason that he failed to provide appropriate medical information that would have allowed the employer to determine if he was fit or unfit to work. The employer believes that Mr. Blackburn's persistent refusal to provide relevant medical information made him unsuitable to carry out his responsibilities as a correctional officer (Exhibit G-3).

[62] Mr. Marshall agreed that the employer had never ordered Mr. Blackburn to produce an updated medical certificate or to participate in a Health Canada evaluation. In Mr. Marshall's view, the requests made by the employer were reasonable and should have been acceded to by the grievor.

For the grievor

[63] Devo Dyette has worked for the CSC since 1991 but never at Millhaven. He was at one time a union steward with the Public Service Alliance of Canada. He has been involved in many grievances including several of his own. Mr. Dyette indicated that the practice of the CSC is for the employer to ask for a medical certificate for a sick leave request of more than three days.

[64] Mr. Blackburn joined the CSC in September 1992. In early 1997, the grievor applied for and obtained a year's leave without pay to join the NRPF. While at the NRPF, the grievor was involved in incidents that led to criminal charges against him in Cobourg and Hamilton Ontario.

[65] The CSC suspended Mr. Blackburn without pay when it became aware of the criminal charges against him. Mr. Blackburn grieved the suspension.

[66] In January 2002, Mr. Blackburn was instructed by the CSC to report for work at Millhaven on February 11, 2002. The grievor showed up at Millhaven on the date in question and what followed was recounted in great detail in the Henry decision.

[67] Mr. Blackburn received the Henry decision on July 8, 2003, while in Michigan, USA. He contacted Millhaven on July 16, 2003, and ended up talking to Ms. Berry to whom he indicated that it was not his intention to report to work because of the stress caused by the criminal charges.

[68] The grievor felt that certain portions of the Henry decision were wrong especially as they related to his entitlement to back pay.

[69] Mr. Blackburn related in detail his dealings with the CSC and his union from February 2002 until his termination on January 16, 2004.

[70] In cross-examination, Mr. Blackburn indicated that the adjustment disorder referred to in Dr. Teodorini's note (Exhibit E-7) would not prevent him from doing his job. Rather, the problem was his inability to work with people in management who sit in judgment of him.

[71] Mr. Blackburn further acknowledged that he had never produced a medical certificate indicating that the CSC had contributed to his stress or inability to work.

Finally, Mr. Blackburn refused a request by counsel for the employer to produce the file he had obtained from Dr. Teodorini when their doctor/patient relationship ended.

Arguments

[72] The parties were asked to make written submissions which are reproduced in full below.

[73] The submissions on behalf of the employer are as follows:

> ***Part I - The Grievance***
>
> 1. *On January 16, 2004 the Grievor Meichland Blackburn was terminated from his position as a CX-01 employed by the Treasury Board, within the Correctional Service of Canada ("CSC").*
>
> 2. *On January 25, 2004, and January 26, 2004, Mr. Blackburn filed a grievance against his termination. There appear to be two different grievances against the termination, executed and delivered on different days, however, their substance appears to be the same.*
>
> 3. *The Grievances were referred to the final level of the grievance procedure and a decision at the final level was rendered on March 22, 2004. Mr. Blackburn referred the Grievance to Adjudication by filing a Form 14 with the Public Service Staff Relations Board on or about March 24, 2004.*
>
> 4. *The matter came on for a hearing before the Chairman of the Board, Mr. Yvon Tarte sitting as an Adjudicator. The matter proceeded on December 14 and 15, 2004, June 6 and 7, 2005, and October 3 through 6, 2005 at Kingston Ontario.*
>
> ***Part II - Rulings during the course of the Hearing***
>
> 5. *The parties agreed that the facts as set out by Deputy Chairperson Henry in her decision of June 20, 2003 (Ex G-1) were accurate.*
>
> 6. *The Grievor was represented on the first day of the hearing, December 14, 2004, by his Bargaining Agent's representatives, Mr. Michel Bouchard, and Desirée Barbarosa, of UCCO SACC CSN. At the outset of the second day of the hearing, December 15, 2004, the Grievor dismissed his Union Representatives.*
>
> 7. *Upon dismissing his Union Representatives, the Grievor requested that he be permitted to re cross examine the first*

witness, Ms Cindy Berry, whose evidence was completed at the conclusion of the first day of the hearing. The Chairman ordered Ms Berry to return to the witness box to allow Mr. Blackburn to cross examine her.

8. *Upon reconvening on June 6, 2005, the Grievor requested an order excluding witnesses. As neither the Employer nor the Bargaining Agent had made such request at the outset of the hearing on December 14, 2004, no order was made by the Chairman. The Employer did not object to the request by the Grievor on June 6, and an Order was made by the Chairman.*

9. *On June 6, 2005, during the course of the cross examination of Ms Berry by the Grievor, the Grievor asked questions of the witness with respect to several other grievances he had filed with respect to, inter alia, vacation leave requests, parental leave requests, marriage leave requests, and sick leave requests (since filed as Exhibits G-32 through G-45). The Employer objected to the line of questioning, and the Chairman agreed with the Employer's position that the matters were not properly before the hearing, given that the grievances, amongst other things, required the consent and representation of the Grievor's Bargaining Agent, whom the Grievor had terminated during the course of the second day of the hearing. The Chairman made an order that <u>if</u> he reinstated the Grievor to his position, he would make an order extending the time for the Grievor to pursue those grievances.*

Part III - The Facts

<u>*Background*</u>

10. *The Grievor commenced his employment with the Correctional Service of Canada ("CSC") in or about September of 1992. He had been previously employed as a police officer with the Niagara Regional Police Service ("NRPS"). While employed with the CSC, the Grievor was a CX-01 working at Milhaven Maximum security institution in Kingston Ontario.*

    Ex G-1, PSSRB Decision No 166-2-20944, at para 131.

11. *In or about April of 1997, pursuant to a complaint he had filed with the Ontario Human Rights Commission, the Grievor was offered his job back with the NRPS. The Grievor requested a leave of absence without pay for one year and the leave was granted by CSC.*

    Ex G-1, PSSRB Decision No. 166-2-20944, at paras 19, 131-132.

12. *In or about October of 1997, the Grievor was charged with Dangerous Driving by the Ontario Provincial Police ("OPP") in the vicinity of Cobourg, Ontario ("Cobourg incident"). In or about April of 1998, the Grievor was charged with a number of criminal charges including assault and assault with a weapon, arising out of an incident involving himself and a bicycle courier in the City of Hamilton ("Hamilton incident").*

    Ex G-1, PSSRB Decision No 166-2-20944, at paras 11, 20-21, 29, 31-33.

13. *Throughout the period of June 1, 1997 to July 9, 2002, the Grievor remained employed and paid on a full time basis by the NRPS. Between July 9, 2002 and December 5, 2002, Mr. Blackburn was off duty from the NRPS on medical leave without pay. He was terminated from his position with NRPS on December 5, 2002. At the time of the PSSRB hearing before Madame Henry, that termination was under appeal to the Ontario Civilian Commission on Police Services.*

    Ex G-1, PSSRB Decision No 166-2-20944, at paras 3, 5, 12 and 163.

14. *In or about the spring of 1998, CSC became aware of the charges arising out of both the Hamilton and Cobourg incidents. The Grievor was suspended without pay (notwithstanding being on LWOP) by Milhaven Warden Lou Kelly.*

    Ex G-1, PSSRB Decision No 166-2-20944, at paras 20-21, 29, 31-33.

15. *The Grievor was acquitted of the charges arising out of the Hamilton incident on or about February 8, 2001.*

    Ex G-1, PSSRB Decision No 166-2-20944, at para 163.

16. *On April 30, 1999, the Grievor was tried and convicted of the charges arising out of the Cobourg incident. On August 11, 1999, the Grievor was sentenced to 30 days in jail and had his license suspended for a period of one year. The Grievor appealed this decision. The appeal was allowed on July 13, 2000 and a new trial was ordered. At his second trial in June of 2002, the Grievor was convicted of the charges arising out of the Cobourg incident and was given the same sentence in November of 2002. The Grievor appealed the conviction and sentence. At the time of the hearing before Madame Henry, the Appeal was still pending.*

Ex G-1, PSSRB Decision No 166-2-20944, at paras 11, 31 -34, 38, 163.

17. *Notwithstanding the suspension and the outstanding Cobourg charge (pending appeal), the Grievor was requested to return to work at Milhaven Institution by letter dated January 10, 2002 from Assistant Deputy Commissioner of Operations Lou Kelly (Ex E-27).*

    Ex E-27, Letter from L Kelly to M Blackburn dated January 10, 2002;
    Ex G-1, PSSRB Decision No 166-2-20944 at para 69.

18. *Notwithstanding the Grievor's written refusal to attend and return to work at Milhaven (contained in a letter dated January 21, 2002 from Mr. Blackburn to Mr. Kelly, Ex E-28), the Grievor attended at Milhaven Institution on February 11, 2002 as requested.*

    Ex E-28, Letter from M Blackburn to L Kelly dated January 10, 2002;
    Ex G-1, PSSRB Decision No 166-2-20944, at paras 86, 88, 90, 93, 94, 144-150.

19. *Upon attending Milhaven Institution on February 11, 2002, Mr. Blackburn was met by the Deputy Warden Cathy Gainer, and requested a Leave Application form and a union representative. Mr. Blackburn was not prepared to work, did not work, and filled out a Leave Application form, requesting Sick Leave without pay for a period noted as "indefinite". The Grievor then departed the institution. The Grievor returned to St. Catherine's on February 11, 2002.*

    Ex G-1, PSSRB Decision No 166-2-20944, at paras 86, 88, 90, 93, 94, 144-150, 175;
    Ex G-2, Leave Application Form dated 11-02-02.

20. *The Grievor was terminated from his employment by CSC on February 21, 2002, retroactive to February 11, 2002. This termination was the subject matter of PSSRB file No 166-2-20944 and a hearing was held with respect to this matter on October 17 and 18, 2002 and March 3 to 6 and May 5, 2003. Deputy Chairperson E. Henry rendered a decision with respect to this matter on June 20, 2003.*

    Ex G-1, PSSRB Decision No 166-2-20944.

PSSRB Decision of Deputy Chairperson Henry dated June 20, 2003

21. *Deputy Chairperson Henry made the following findings as set out in her decision of June 20, 2003:*

i. *The indefinite suspension had become a suspension from May 25, 1998 to February 11, 2002. No evidence of misconduct was ever submitted by the Employer to justify such a suspension. While an indefinite suspension pending investigation would have been appropriate for a month or so, this would have required that an investigation take place. None took place after May 25, 1998; therefore, I have to find that the suspension was unwarranted. To that extent, the suspension grievance is allowed. In looking at the remedies requested by Mr. Blackburn, I have to look at the facts of his case, which are quite different from those of the Grievor in* Larson *(*supra*).*

Ex G-1, PSSRB Decision No 166-2-20944, at para 297.

ii. *Mr. Blackburn was on leave without pay when he was suspended. His leave was ending May 31, 1998. This is the status he should revert to for that period. From June 1, 1998 to February 11, 2002, Mr. Blackburn was employed by the Niagara Regional Police Service and received salary and benefits superior to that of his position at CSC. The Employer is therefore entitled to deduct from the salary it would owe Mr. Blackburn during the period of June 1 1998, to February 11, 2002, the salary Mr. Blackburn received from the Niagara Regional Police Service during that period.*

Ex G-1, PSSRB Decision No 166-2-20944, at paras 298-299.

iii. *With regard to benefits such as pension, leave credits and seniority, Mr. Blackburn is entitled to have the period of June 1, 1998 to February 11, 2002 count as pensionable service, earn leave credits and accumulate seniority except for a period from October 18, 1999 to February 19, 2001. October 18, 1999 was the date this suspension grievance was initially scheduled for a hearing according to the Grievor's Exhibit G-11; it was postponed at Mr. Blackburn's request pending his court case. February 19, 2001 is the date on which the Board was advised that Mr. Blackburn was requesting the matter be heard as soon as possible (Exhibit G-13).*

Ex G-1, PSSRB Decision No 166-2-20944, at para 300.

iv. *For more clarity, Mr. Blackburn is entitled to have his pension restored for the period of June 1, 1998 to October 18, 1999 and from February 19, 2001 to February 11, 2002. He is entitled to earn leave credits in accordance with applicable collective agreements for the same periods and have his years of seniority*

reflect these periods as if they were periods of full employment with CSC.

Ex G-1, PSSRB Decision No 166-2-20944, at para 301.

v. On February 11, 2002, Mr. Blackburn reported to Milhaven Institution as directed and requested sick leave without pay for an indefinite period. Looking at what occurred on February 11, 2002, was there misconduct warranting termination of employment? Mr. Blackburn was instructed to report to work on February 11, 2002, and he did. He was not in violation of the Code of Discipline in refusing to report to work. Applying for indefinite sick leave without pay is not in itself misconduct. Had Mr. Blackburn been denied the leave and told to remain at work, the Employer may have been justified in disciplining him, but Mr. Blackburn was not told his leave was denied. Mr. Blackburn was asked if he had a medical certificate; he did not, but at no time was he told he had to submit one.

Ex G-1, PSSRB Decision No 166-2-20944, at paras 306, 308-310.

vi. The Employer assumed that because Mr. Blackburn remained employed as a Police Officer with the Niagara Regional Police Service, he wasn't sick. This assumption was reached without inquiring from Mr. Blackburn what his duties were at NRPS and without consideration for the basis on which Mr. Blackburn claimed to be sick. The Employer did not follow its normal procedures for dealing with sick leave requests.

Ex G-1, PSSRB Decision No 166-2-20944, at para 311.

vii. The medical evidence submitted at the hearing indicates that Mr. Blackburn suffers from "Adjustment Disorder (309)". Is that condition sufficient to prevent a Correctional Officer from performing his duties? Only a doctor can say.

Ex G-1, PSSRB Decision No 166-2-20944, at para 312.

viii. Had the Employer followed its own policies in dealing with sick leave and discipline, it would have requested that Mr. Blackburn submit a medical certificate. The Employer might have required that Mr. Blackburn's doctors apprise themselves of Mr. Blackburn's job description. The Employer would have informed Mr. Blackburn that his leave request was denied until he produced the proper medical documentation.

Ex G-1, PSSRB Decision No 166-2-20944, at para 313.

ix. *Mr. Blackburn is entitled to the rights and privileges associated with being on sick leave without pay from February 21, 2002 to the date of receipt of this decision. If Mr. Blackburn has sick leave credits, he may elect to use these credits from the date of receipt of this decision until the date he is declared fit to return to work.*

Ex G-1, PSSRB Decision No 166-2-20944, at para 321.

x. *The Employer may require that Mr. Blackburn be seen by its own medical advisors if it is challenging Mr. Blackburn's medical certification.*

Ex G-1, PSSRB Decision No 166-2-20944, at para 322.

Post PSSRB Decision dated June 20, 2003

22. *Upon review of the PSSRB decision, Milhaven Warden Jim Marshall assigned Acting Deputy Warden ("ADW") Cindy Berry, (substantive position Unit Manager) to manage Mr. Blackburn's return as per the decision of Madame Henry.*

Evidence of J Marshall, October 3-4, 2005;
Evidence of C Berry, December 14, 2004 and June 6-7, 2005;
Ex E-1, Curriculum Vitae of C Berry.

23. *Ms Berry made handwritten notes of the conversations that she had with Mr. Blackburn, which notes were made contemporaneously with the various conversations. Copies of both the original handwritten notes and a typewritten transcription were entered as Exhibits E-3, E-5, E-10 and E-13 at the Hearing.*

Evidence of C Berry, December 14, 2004 and June 6-7, 2005;
Ex E-3, Handwritten Notes of C Berry dated 16 July 03; 17 July 03; 22 July 03;
Ex E-5, Handwritten Notes of C Berry dated 28 July 03; 30 July 03; 31 July 03;
Ex E-10, Handwritten Note of C Berry dated 15 September 03;
Ex E-13, Handwritten Note of C Berry dated 07 November 03.

24. *ADW Berry spoke with Mr. Blackburn on July 16, 2003. During the course of that discussion, Mr. Blackburn enquired as to the payment of lost wages and benefits. Ms Berry advised Mr. Blackburn at that time that her*

interpretation of the decision indicated that none were payable. Also during the course of that discussion, Mr. Blackburn enquired as to whether CSC would question his fitness (physicians) certificate, to which Ms Berry advised that the Employer would want to see the certificate. Mr. Blackburn requested a Leave Application Form.

Evidence of C Berry, December 14, 2004;
Ex E-3, Handwritten Note of C Berry dated 16 July 2003.

25. *On July 17, ADW Berry had a second telephone conversation with Mr. Blackburn. Mr. Blackburn indicated in the course of that conversation that he would be requesting "parental leave" and requested a copy of the Collective Agreement.*

Evidence of C Berry, December 14, 2004;
Ex E-3, Handwritten Note of C Berry dated 17 July 2003.

26. *On July 24, 2004, ADW Berry sent to Mr. Blackburn a letter confirming their telephone conversation of July 16, 2003, and addressing the issues raised in their telephone conversation. Ms Berry made it clear that the Employer's interpretation of the PSSRB decision was that no "financial compensation" was owed. Ms Berry went on to advise that the decision did allow for leave benefits and confirmed that Pay and Benefits had adjusted his leave entitlements according to the decision and had forwarded this information to him.*

Evidence of C Berry, December 14, 2004;
Ex E-4, Letter dated July 24, 2003 from C Berry to M Blackburn.

27. *With respect to the issue of Mr. Blackburn's status as of the date of the decision of the PSSRB, Ms Berry stated both in her correspondence (Ex E-4) and in her evidence before Chairman Tarte, that the Employer interpreted the decision as placing Mr. Blackburn on authorized sick leave without pay. She requested of Mr. Blackburn to provide to the Employer an updated leave request form (**a blank one was attached to the letter**) reflecting his current status. Ms Berry then advised that if Mr. Blackburn wanted to continue on sick leave (**with or without pay, and using his newly adjusted sick leave credits**) he would have to accompany that form with a Physicians Certificate (**a blank one was attached**) indicating that he was not fit to return to work. Ms Berry then stated that if in fact Mr. Blackburn wished to return to work, a Physicians Certificate was required indicating his fitness prior to his return.*

Evidence of C Berry, December 14, 2004;

Ex E-4, Letter dated July 24, 2003 from C Berry to M Blackburn.

28. *On July 17, 2003, the Employer wrote to Mr. Blackburn under cover of a letter signed by Wendy Smith, a Compensation and Benefits Consultant. Ms Smith, in the first paragraph of her correspondence to Mr. Blackburn, confirmed that he was on sick leave without pay and advised him that he was eligible to apply for benefits under the Disability Insurance Plan. A copy of the Plan was forwarded to Mr. Blackburn, together with the Attending Physician's Statement*

    Form (TBS 330-304E) and the Employee Statement (TBS 330-302E).

    Ex E-24, Letter dated July 17, 2003 from W Smith to M Blackburn.

29. *In the fourth paragraph of her correspondence, Ms Smith advises that there is an elimination period of thirteen weeks of disability, or if later, the expiration of your paid sick leave, before benefits would commence if you are approved by the Insurer. In the first paragraph of the second page of Ms Smith's letter, she confirms to Mr. Blackburn that if he is approved for benefits, he would receive 70% of his adjusted annual salary in monthly payments.*

    Ex E-24, Letter dated July 17, 2003 from W Smith to M Blackburn.

30. *Also attached with the correspondence of July 17, 2003 was a summary of Mr. Blackburn's reinstated leave balances.*

    Ex E-24, Letter dated July 17, 2003 from W Smith to M Blackburn.

31. *Lorianne Dowsett, who was the Supervisor for the Compensation and Benefits section of the Correctional Service of Canada Ontario Regional Office attended and gave evidence at the within hearing on Tuesday, June 7, 2005. Ms Dowsett stated that the letter sent by Ms Smith would ordinarily be sent to employees who are on sick leave, who could potentially qualify for disability pursuant to the disability benefits. Ms Dowsett indicated that if Mr. Blackburn qualified, he would receive 70% of his adjusted annual salary, in monthly payments.*

    Ex E-24, Letter dated July 17, 2003 from Smith to Blackburn;
    Evidence of Lorianne Dowsett, June 7, 2005.

32. *Mr. Blackburn did not return the forms nor did Mr. Blackburn apply for disability benefits.*

Evidence of Lorianne Dowsett, June 7, 2005;
Evidence of Meichland Blackburn, October 6, 2005.

33. *On July 28, 2003, Mr. Blackburn contacted Ms Berry with respect to the earlier conversation and Ms Berry advised that a package (Ex E-4) had been couriered to him on the 25th of July 2003. Mr. Blackburn called a second time on July 28, 2003 requesting a copy of the UCCO SACC CSN Collective Agreement, as well as a copy of his Job Description. Both of these documents were sent to him under cover of a memo dated July 30, 2003, and found at Ex E-6.*

Evidence of C Berry, December 14, 2004;
Ex E-5, Handwritten Notes of C Berry dated 28 July 2003;
Ex E-6, Transmittal Note and Receipt dated 30 July 2003 from C Berry to M Blackburn.

34. *On August 4, 2003, via facsimile transmission, Mr. Blackburn forwarded to Ms Berry a Leave Application form dated February 11, 2002, and signed August 4, 2003 by him, requesting Sick Leave without Pay (Code 230), from 07:00 hrs on February 11, 2002 to "Indefinite". Mr. Blackburn also included a letter from Dr I.K. Teodorini dated May 13, 2002. This is the same letter filed at the previous PSSRB hearing before Madame Henry and is referred to in decision No. 166-2-20944.*

Evidence of C Berry, December 14, 2004;
Evidence of C Berry, June 6-7, 2005;
Ex E-7, Leave Application dated August 4, 2003 and Teodorini letter dated May 13, 2002;
Evidence of M Blackburn, October 5-6, 2005;
Ex G-1, PSSRB Decision No 166-2-20944, para 159.

35. *ADW Berry responded to Mr. Blackburn's Leave Application and Letter from Dr Teodorini by letter dated August 14, 2003. Ms Berry advised Mr. Blackburn in the letter that his request for sick leave from Feb 11, 2002 to "Indefinite" was not acceptable as there must be an end date. Ms Berry requested Mr. Blackburn to submit a new Leave form with an end date specified. Ms Berry further advised Mr. Blackburn that the letter of Dr. Teodorini dated May 13, 2002 does not reflect that he is unfit for duty. Ms Berry requested Mr. Blackburn to submit a* ***"current"*** *Physician's Certificate to substantiate his inability to return to work. Ms Berry further stated that if Mr. Blackburn wished to return to work, a Physician's Certificate is also required indicating that he is fit to return to work.*

Evidence of C Berry, December 14, 2004;
Evidence of C Berry, June 6-7, 2005;
Ex E-8, Letter dated August 14, 2003 from C Berry to M Blackburn.

36. *On August 8, 2003, Mr. Blackburn submitted a Leave Application requesting Marriage Leave. Ms Berry responded to this request by letter dated August 22, 2003. In addition to responding to the Marriage Leave request, Ms Berry stated in the third paragraph of her letter that a letter had been forwarded to Mr. Blackburn requesting:*

    i) resubmission of his sick leave form for the period from February 2, 2002 to a specific end date;

    ii) a current Physician's Certificate to substantiate his inability to return to work as the previous certificate was dated May 13, 2002 and was out of date;

    iii) status of the Criminal Conviction Appeal on the Cobourg incident;

    Evidence of C Berry, December 14, 2004;
    Evidence of C Berry, June 6-7, 2005;
    Ex E-9, Letter dated August 22, 2003 from C Berry to M Blackburn.

37. *On September 15, 2003, ADW Berry had a telephone conversation with Mr. Blackburn. Amongst other things discussed, Ms Berry requested that Mr. Blackburn provide the Employer with a Leave Request Form with an End date, and a* ***"current"*** *Physician's Certificate.*

    Evidence of C Berry, December 14, 2004;
    Evidence of C Berry, June 6-7, 2005;
    Ex E-10, Handwritten Note of C Berry dated September 15, 2003.

38. *On October 30, 2003, Mr. Blackburn forwarded to Ms Berry a Leave Application and Absence Report Form, dated February 11, 2002 and executed by Mr. Blackburn on October 30, 2003. The form requested sick leave without pay from 07:00 hrs on February 11, 2002 to 16:00 hrs on August 14, 2004 (some 9.5 months into the future). Mr. Blackburn did not submit a Medical Certificate or Doctor's letter of any kind with this Application Form.*

    Evidence of C Berry, December 14, 2004;
    Evidence of C Berry, June 6-7, 2005;
    Ex E-11, Leave Application and Absence Report executed October 30, 2003.

39. *On November 5, 2003, Ms Berry wrote to Mr. Blackburn responding to his letter of October 30, 2003 and acknowledging receipt of his Leave Application and Absence Report executed September 28, 2003 requesting "certified" sick leave, (Code 220), from 07:00 hrs February 21, 2002 to "Present". Ms Berry advised Mr. Blackburn in the second paragraph of her letter that if he was seeking certified sick leave, it must be accompanied by a* ***"current"*** *Physician's Certificate indicating that he is not able to report for duty. Ms Berry went on to state that once the Physician's Certificate is received the Application would be considered.*

Evidence of C Berry, December 14, 2004;
Evidence of C Berry, June 6-7, 2005;
Ex E-12, Letter dated November 5, 2003; Leave Application executed September 28, 2003

40. *Ms Berry, in paragraph four of her letter of November 5, 2003, reiterated the Employer's request for Mr. Blackburn (for the fourth time) requesting:*

    i) *a resubmission of a Leave Form for the period of February 11, 2002 to a specific end date;*

    ii) *a* ***"current"*** *Physician's Certificate to substantiate his inability to return to work (noting that the previous certificate was dated May 13, 2002 (some 18 months old));*

    iii) *that the above information is to be received by the Institution no later than November 17, 2003;*

    iv) *that the medical information must be acceptable to the Employer and satisfies the Employee's performance standards;*

    v) *failure to comply or to report for duty with a Physician's Certificate indicating that he is fit for duty will be considered abandonment of position and shall result in termination for cause.*

    Ms Berry also invited Mr. Blackburn to contact her if he had any questions and added her phone number at the end of the letter.

    Evidence of C Berry, December 14, 2004;
    Evidence of C Berry, June 6-7, 2005;
    Ex E-12, Letter dated November 5, 2003.

41. *A telephone conversation occurred between Ms Berry and Mr. Blackburn on November 7, 2003. During the course of that conversation Ms Berry advised Mr. Blackburn that a*

letter had been sent to him regarding his requests for leave. Mr. Blackburn was advised that he had sick leave credits that had been reinstated to him as per the PSSRB decision (Ex E-4, attachment showing Leave Credits as reinstated). He was further advised by Ms Berry that the letter of Dr. Teodorini dated May 13, 2002 was ***not*** *acceptable and that a* ***"current"*** *Physician's Certificate was required. Mr. Blackburn appeared unwilling to accept this fact and attempted to convince Ms Berry during the course of the conversation that Teodorini's May 13, 2002 letter was sufficient. Ms Berry reiterated that it was not and that the Employer wanted a* ***"current"*** *Physician's Certificate. Ms Berry testified that at this point Mr. Blackburn became hostile and as such she terminated the call.*

Evidence of C Berry, December 14, 2004;
Evidence of C Berry, June 6-7, 2005;
Ex E-13, Handwritten Note of C Berry dated 07 Nov 2003.

42. *Ms Berry confirmed the telephone discussion of November 7, 2003 with Mr. Blackburn in a letter dated that same day (Ex E-14). Again, Ms Berry reiterated that the Employer required a* ***"current"*** *Physician's Certificate with the Leave Application before it will be considered. Ms Berry went on to state that Mr. Blackburn's assertion that Dr. Teodorini's letter of May 13, 2002 was acceptable and that Ms Berry did not have the authority to request a current certificate, was not correct. Ms Berry reiterated to Mr. Blackburn that he had been requested on several occasions (including several letters) to provide an appropriate Physician's Certificate. Ms Berry further advised that it was the Employer's right to request a current sick leave certificate to substantiate sick leave and that the Teodorini letter of May 13, 2002 was not acceptable.*

Evidence of C Berry, December 14, 2004;
Evidence of C Berry, June 6-7, 2005;
Ex E-14, Letter of November 7, 2003 from C Berry to M Blackburn.

43. *In the final paragraph of her letter of November 7, 2003 (Ex E-14), Ms Berry reiterated that the Employer had requested in writing (on July 24, August 14 and 22, and November 5) an appropriately filled out Leave Request and a* ***current Physician's Certificate*** *to substantiate Mr. Blackburn's inability to return to work. It reiterated yet again that the Teodorini letter of May 13, 2002 was unacceptable. It further stated that the information must be in the hands of the Institution by November 17, 2002 (as stated in Ex E-12 previously) and that the information in the Physician's Certificate must be acceptable to the Employer and satisfy the Employee's performance*

standards. Ms Berry reiterated that failure to comply or to report to duty with a Physician's Certificate indicating that Mr. Blackburn is fit to perform his duties will be considered abandonment of position and shall result in termination.

Evidence of C Berry, December 14, 2004;
Evidence of C Berry, June 6-7, 2005;
Ex E-14, Letter of November 7, 2003 from C Berry to M Blackburn;
Ex E-12, Letter dated November 5, 2003.

44. *On November 18, 2003 a letter dated November 12, 2003 from a Dr. John Yee, a Family Physician in Windsor, Ontario, was received in the office of the Deputy Warden at Milhaven Institution (Ex E-15). The letter stated that Dr. Yee had seen Mr. Blackburn on November 12, 2003 for a physical examination and a medical certificate stating that he is unfit for duty at present. Dr. Yee went on to state that although he had carried out a physical examination on Mr. Blackburn, he could not provide him with a certificate that states he is either fit or unfit, as he did not have a patient history.*

Evidence of C Berry, December 14, 2004;
Evidence of C Berry, June 6-7, 2005;
Ex E-15, Letter dated November 12, 2003 from Dr. J Yee to J Marshall;
Evidence of J Marshall, October 3-4, 2005.

45. *On November 13, 2003, the Grievor wrote to Ms Berry advising that he had called Dr. Teodorini's office and had booked an appointment to see him on November 28, 2003. However, notwithstanding the appointment, the Grievor states in the third paragraph of the letter that, "if the Doctor feels that the Grievor is fit to return to work, he will consider it or seek another opinion. He goes on to state that if he feels that he is not fit, he will obtain a medical certificate". He then goes on to state that Dr. Teodorini may choose not to become involved and refer the Grievor* ***and his medical history*** *to another doctor.*

Evidence of C Berry, December 14, 2004;
Evidence of C Berry, June 6-7, 2005;
Ex E-16, Letter dated November 13, 2003 from M Blackburn to C Berry.

46. *When the Employer received no medical certificate from anyone by December 3, 2003, Ms Berry wrote to the Grievor and advised that since the Grievor had failed to provide a Physician's Certificate, his sick leave applications were denied. In addition, she advised that since the Employer has an obligation to ensure that employees are able to fulfill their duties and responsibilities, and a current*

Physician's Certificate was not received from the Grievor, the Employer was referring the Grievor to Health Canada for an assessment to determine if he was medically fit to work.

Evidence of C Berry, December 14, 2004;
Evidence of C Berry, June 6-7, 2005;
Ex E-17, Letter dated December 3, 2003 from C Berry to M Blackburn.

47. *Enclosed with Ms Berry's correspondence of December 3, 2003 were:*

    1. *Health Canada Referral Protocol;*

    2. *A referral letter addressed to Linda Davidson and dated December 3, 2003;*

    3. *Correctional Officer 1 Performance Standards;*

    4. *Consent to Release Information;*

    5. *Consent to Medical Assessment.*

    Ms Berry requested that the Grievor execute the consents and return them to Milhaven no later than January 5, 2004.

    Evidence of C Berry, December 14, 2004;
    Evidence of C Berry, June 6-7, 2005;
    Ex E-17, Letter dated December 3, 2003 from C Berry to M Blackburn;
    Ex E-18, Returned Consent Forms;
    Ex G-6, Protocol for a Health Canada Assessment.

48. *On or about December 12, 2002, the Grievor returned the consent forms to the Employer. The Consent to Release of Medical Information clearly indicates that the Grievor was not prepared to consent to the release of any information. In the section where the name of the Grievor's doctors should be named, the Grievor wrote* ***"Party Not Named M.B."****. In the declaration portion of the consent where the signatory would ordinarily indicate their voluntary release of information for a particular period of time and execute, the Grievor crossed out the word voluntary and wrote* ***"involuntarily",*** *and struck out the date that had been written in by Ms Berry of April 30, 2004. Where a consenting party would normally sign, date and have their signature witnessed, the Grievor wrote* ***"I DO NOT CONSENT" M.B.*** *and struck out the section for dating and witnesses.*

    Evidence of C Berry, December 14, 2004;

Evidence of C Berry, June 6-7, 2005;
Ex E-18, Returned Consent Forms.

49. *At the same time that the Grievor returned the "Consent to Release of Information" form, he also returned the "Consent to Medical Assessment" form. As with the Consent to Release of Information form, the Grievor struck out all of the relevant wording of the consent, specifically his consent to:*

    1. *to be examined;*

    2. *that the examining physician provide a report of the medical findings to the physicians at Health Canada;*

    3. *that the occupational physicians of Health Canada provide the Employer with a non-medical interpretation of the medical report and recommendations on that report;*

    4. *that the consent is given voluntarily.*

    It is clear from the striking out of the relevant portions that the Grievor was not consenting to being examined by a physician; or that the physician could report to Health Canada or the Employer on the Grievor's medical condition.

    Evidence of C Berry, December 14, 2004;
    Evidence of C Berry, June 6-7, 2005;
    Ex E-18, Returned Consent Forms.

50. *On the bottom of the Consent to Medical Assessment form, the Grievor wrote in the following:*

    > *Will attend the office of the designated physician by Health Canada in response to my Employer's request to return to work.*

    The grievor then signed and dated the document.

    Evidence of C Berry, December 14, 2004;
    Evidence of C Berry, June 6-7, 2005;
    Ex E-18, Returned Consent Forms.

51. *The Grievor produced the following four Medical Certificates/Letters from Doctors during the course of this hearing as well as during the course of the hearing before Madame Henry, being:*

    1. *Attending Physicians Statement of Dr I.K. Teodorini dated February 18, 1998;*

2. *Letter from Dr. John Wright, Psychiatrist to Dr. Teodorini dated January 21, 1998;*

3. *Letter from Dr. Shukla, Psychologist to Dr Teodorini dated August 4, 1999;*

4. *Letter from Dr Teodorini, "To Whom it May Concern" dated May 13, 2002;*

Ex G-1, PSSRB Decision No. 166-2-20944, at paras 124-125, 159, 162, 172.
Ex G-19, Letter dated August 4, 1999 from Dr. Shukla to Dr. Teodorini;
Ex G-20, Attending Physicians Statement of Dr. Teodorini dated February 18, 1998;
Ex G-21, Letter dated January 21, 1998 from Dr. Wright to Dr. Teodorini;
Ex G-22, Letter dated May 13, 2002 from Dr. Teodorini to "whom it may concern".

52. *The letter of Dr. Wright dated January 21, 1998 refers to seeing Mr. Blackburn on January 5, 1998. The problem identified in the letter is called a situational one "giving rise to considerable stress". Dr. Wright recounts Mr. Blackburn's long history involving conflict with the NRPS that extends over eight years. He then refers to off-duty incidents involving OPP Officers involving a traffic ticket and a speeding offence. He also recounts how Mr. Blackburn is charged under the* Police Act *and there is some alleged violence. Dr. Wright then states that Mr. Blackburn has been reassigned to Headquarters work, which he finds stressful. Dr. Wright then outlines Mr. Blackburn's family and educational background. The only reference to the CSC is on the second page of the letter where Dr. Wright refers to Mr. Blackburn working five years as a guard at Milhaven prior to getting his job back with NRPS.*

Ex G-21, Letter dated January 21, 1998 from Dr. Wright to Dr. Teodorini.

53. *Dr. Wright sets out in the second page of his letter that because of the peculiar circumstances in which Mr. Blackburn finds himself, he is under a great deal of daily stress in the workplace (NRPS) and this seems likely to continue until such time as he is reassigned to regular duties. He further states that Mr. Blackburn is finding it difficult to continue on a daily basis (NRPS) and Dr. Wright feels that on that account it is justifiable for him to be off work (NRPS) on medical grounds. He states that there is not likely to be a change in his symptomatology until such time as the dispute is settled.*

Ex G-21, Letter dated January 21, 1998 from Dr. Wright to Dr. Teodorini.

54. *Dr. Teodorini filled out an NRPS Attending Physician's Statement on February 18, 1998 in reference to a Februrary 2, 1998 visit. Dr. Teodorini states that:*

> *"in his view the patient is incapacitated from performing his duties and feels that he will be able to return to work when the present conflict/dispute is resolved."*

Under the heading of rehabilitation, Dr. Teodorini answers the question "Is patient a suitable candidate for modified duties?" He answered "No" and explained that the conflict for work was due to stress at the workplace, which is unlikely to change until resolution of the present problem. There is no reference to employment with CSC. Mr. Blackburn was on authorized LWOP from CSC during this period of time (June 1, 1997 to May 31, 1998).

Ex G-20, Attending Physicians Statement of Dr. Teodorini dated February 18, 1998.

55. *Dr. Teodorini, in addition to referring Mr. Blackburn to Dr. Wright, referred Mr. Blackburn to Dr. Shukla. Dr. Shukla reported to Dr. Teodorini in a letter dated August 4, 1999. (Ex G-19) On the first page of Dr. Shukla's letter of August 4, 1999, Dr. Shukla indicated that Mr. Blackburn's chief complaint is that he is stressed out, frustrated, and anxious and he has problems at work since December of 1997. Dr. Shukla indicates that these problems are vis à vis as a Police Constable for the NRPS. He states that Mr. Blackburn indicated to him that his present livelihood is threatened as the NRPS are trying to get rid of him. He confirms that he was convicted of dangerous driving in April of 1999 and that they (Crown Prosecutor) are going to try to sentence him with a jail term. If he is given jail term, they (NRPS) will have grounds to fire him from the Police Force.*

Ex G-19, Letter dated August 4, 1999 from Dr. Shukla to Dr. Teodorini.

56. *On the second page of Ex G-19, Dr. Shukla confirms that Mr. Blackburn was also facing two assault charges in Hamilton. Under personal history, Dr. Shukla indicates that Mr. Blackburn has been with the Police Force (NRPS) for nine years and he is trying to get his job back. There is no reference to him being employed, at any time, with the Correctional Service of Canada. On the third page of Dr. Shukla's letter, he finds that Mr. Blackburn has an "adjustment disorder". Dr. Shukla recommends that there*

be no medication, and that he should be suspended with pay from the Police Force (NRPS) until the charges have been dealt with.

Ex G-19, Letter dated August 4, 1999 from Dr. Shukla to Dr. Teodorini.

57. *Dr. Teodorini issued a letter on May 13, 2002 which was addressed to "To Whom it may concern". It states: "Mr. Blackburn suffers from an adjustment disorder. The disorder has been present since 1997 and is related to criminal charges brought against him. The charges are not yet fully resolved. Mr. Blackburn continues to complain of poor sleep, irritability, anxiety, forgetfulness, and tiredness. Dr. Teodorini states that he expects his disorder to be resolved following the resolution of criminal charges against him".*

Ex –G-22, Letter dated May 13, 2002 from Dr. Teodorini to "whom it may concern".

58. *There is no medical documentation after this date whatsoever. During the course of Mr. Blackburn's cross examination on October 6, 2005, Mr. Blackburn indicated that he attended at Dr. Teodorini's office and obtained his patient file. It came to light that Mr. Blackburn had the entire patient file with him in Kingston in the trunk of his car. Mr. Blackburn refused to produce the patient file. Mr. Blackburn indicated during the course of his cross examination that he had in fact attended on certain dates to see his doctor, however, Mr. Blackburn also refused to produce the file for even the limited purpose of verifying the dates of his attendances.*

Evidence of M Blackburn, October 6, 2005

59. *On December 16, 2003, the Grievor wrote to Warden Jim Marshall. In the third paragraph of Mr. Blackburn's correspondence, Mr. Blackburn states that:*

> *"I was not able to perform my duties from the dates set out in the Adjudication Decision not because of illness or injury but because I was on suspension, which you are clearly aware. I will not submit a Physician's Statement and if ordered to, the one dated May 13, 2002 is applicable to which I have already submitted to you in protest/objection."*

Ex E-26, Letter dated December 16, 2003 from Blackburn to Marshall.

60. *The Leave Without Pay Policy was entered as Exhibit E-21 by Ms Berry. Page 2 of the Policy states that "where there*

will be leave without pay situations involving illness or injury, departments must adhere to standards in Appendix A of the Policy. Appendix A of the Policy is contained at page 4-5 of Exhibit E-21. The Policy states as follows:

- *when employees are unable to work due to illness or injury and have exhausted their sick leave credits or injury on duty leave, managers must consider granting leave without pay;*

- *where it is clear that the employee will not be able to return to duty within the foreseeable future, managers must consider granting such leave without pay for a period sufficient to enable the employee to make the necessary personal adjustments and preparations for separation from the Public Service on medical grounds;*

- *where management is satisfied that there is a good chance that the employee will be able to return to duty within a reasonable period of time, the length of which will vary according to the circumstances of the case (leave without pay provides an option to bridge the employment gap). Management must regularly reexamine all such cases to ensure that continuation of leave without pay is warranted by current medical evidence.*

- *Management must resolve such leave without pay situations within two years of the leaves commencement, although they can, in some circumstances be extended to accommodate exceptional cases.*

- *The period of such leave without pay must be flexible enough to allow managers to accommodate the needs of employees with special recovery problems, including their retraining.*

Ex E-21, TBS – Leave Without Pay Policy.

61. *The Administration of Sick Leave Policy was entered as Exhibit E-22 to this hearing through Cindy Berry.*

Ex E-22, TBS – Administration of Sick Leave Policy.

62. *Under paragraph 1 of the Administration of Sick Leave Policy, the purpose of the administration of sick leave is to describe the program governing sick leave administration in the Public Service; and to promulgate guidelines for the use of Departments and Agencies in the implementation and evaluation of that program.*

Ex E-22, TBS – Administration of Sick Leave Policy.

63. *The Policy further states that sick leave is intended to protect an employee's earnings from Public Service employment when unable to work by reasons of a non-occupational illness or injury. The protection provided by paid sick leave is complimented by the benefits available under the Disability Insurance Plan for employees subject to collective bargaining, and under the Long-Term Disability Insurance portion of the Public Service Management Insurance Plan for employees excluded from collective bargaining.*

Ex E-22, TBS – Administration of Sick Leave Policy.

64. *Paragraph 3 of the Administration of Sick Leave Policy states that the objective of the program is to ensure the usage of the sick leave benefit is restricted to its intended purpose and to achieve a level of usage which is consistent with that intended purpose.*

Ex E-22, TBS – Administration of Sick Leave Policy.

65. *The Guidelines section of the Administration of Sick Leave Policy states that Departments and Agencies are to ensure that their present program of sick leave administration is consistent with the Guidelines on Sick Leave Administration attached as Appendix A and adapted as the Deputy Head directs, to the particular environment and operational requirements of the Department.*

Ex E-22, TBS – Administration of Sick Leave Policy.

66. *Appendix A – Guidelines on the Administration of Sick Leave Policy is found on page 4 of 10 of Exhibit E-22. The nature of the benefit is outlined, starting at the bottom of page 4 of 10. Sick leave is a form of insurance and is intended to protect an employee's income when the employee is incapable of performing his or her regular duties, due to non-occupational illness or injury, or as a result of determination of pregnancy.* ***The existence of sick leave credits has never been, and is not, intended to relieve the employee of the obligation to render normal service when the employee's state of health is such that he or she may reasonably be expected to do so****. At the bottom of page 5 of 10, it states that* ***sick leave is contingent upon illness or injury, not a kind of additional vacation or time off work for other reasons of a personal nature****. On the top of page 6 of 10,* ***sick leave usage must be restricted to the purpose intended.***

Ex E-22, TBS – Administration of Sick Leave Policy, at p. 4 of 10*.*

67. *On page 8 of 10, under the heading of Medical Certification of Sick Leave, it states that conditions surrounding the granting of sick leave are found in Chapter 3-1 (Exhibit E-21) where the requirements for an employee to produce a medical certificate are defined. The certificate for this purpose is the Physician's Certificate of disability for duty, form NHW 500, which is retained by the employing department. The form does not require the medical diagnosis to be specified in order to maintain the integrity of the Health and Welfare Canada Medical – Confidential Information System. The Medical Services Branch provides assessment, advice and support to deal with troubled employees and provides the necessary coordination with management in accordance with the Employee Assistance Program.*

    Ex E-22, TBS– Administration of Sick Leave Policy, at p. 8 of 10.

68. *Continuing on page 8 of 10 of the Administration of Sick Leave Policy, is the heading of Return to Work Procedures. Stated under this heading is that a comprehensive program of sick leave administration must include specific standard procedures to be observed on return to work of certain employees following absences attributed to non-occupational illness or injury. This procedure may be the single most important facture effecting such employee's perception of the purpose of sick leave and the consequences of its misuse. Continuing on page 9 of 10, under that same paragraph, in the second paragraph, it is stated that:" when an employee's pattern of sick leave usage is of concern or there is sound reason to question an absence requested on medical grounds, the supervisor should request advice and medical assessment through appropriate departmental channels. In some instances, referral of the employee to Health and Welfare Canada for a second medical opinion of ability to carry out the assigned duties of the employee's position may be appropriate".*

    Ex E-22, TBS – Administration of Sick Leave Policy, at p. 8 of 10.

69. *The Correctional Service Collective Agreement, section with respect to the granting of sick leave, was made Exhibit E-23 to this hearing and was introduced through Cindy Berry. Clause 31.02 states that an employee shall be granted sick leave with pay when he or she is unable to perform his or her duties because of illness or injury provided that:*

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

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

Ex E-23, TBS UCCO SACC CSN Collective Agreement.

70. *Clause 31.03 of the Collective Agreement states that unless otherwise informed by the Employer, a statement signed by the employee stating that because of illness of injury, he or she was unable to perform his or her duties, shall, when delivered to the Employer, be considered as meeting the requirements of paragraph 31.02(a)(b).*

Ex E-23, TBS UCCO SACC CSN Collective Agreement.

71. *Mr. Devo Dyette is a Correctional Officer employed with the CSC and stationed at the Regional Health Centre in Kingston, Ontario. The Regional Health Centre is within the confines of Kingston Penitentiary. Mr. Dyette is a CX-02. Mr. Dyette confirmed that he has been employed with the CSC since 1991 and for the past 2 years has been a "shift coordinator". At one point, Mr. Dyette was a Union Steward when PSAC was the bargaining agent for the Correctional Officers.*

Evidence D Dyette, October 5, 2005.

72. *Mr. Dyette was questioned in chief by Mr. Blackburn with respect to Article 31 of the Collective Agreement (sick leave). Mr. Dyette advised that it was his interpretation that the Employer could, if it chooses, confirm whether the employee is actually sick. Mr. Dyette indicated that it was normal practice, as he understood, for someone to call in or book off sick, and for anything under three days, you are usually allowed to be sick without a Doctor's Certificate, however, anything over three days, it is normal to have a Doctor's Certificate. Mr. Dyette confirmed that it was up to the Employer.*

Evidence D Dyette, October 5, 2005.

73. *Mr. Dyette further confirmed that he was never in the position to ask someone for a medical certificate. He also confirmed that he was not aware of an employee being granted sick leave without pay for an indefinite period of time.*

Evidence D Dyette, October 5, 2005.

74. *Mr. Dyette also indicated that it is his understanding that if a person is on sick leave without pay and the Employer is requesting a Doctor's Certificate, the Employer has the right to do so as the Employer has the right to manage. If the Employer requests a Doctor's Certificate, the employee should comply and produce the Doctor's Certificate.*

Evidence D Dyette, October 5, 2005.

75. *On December 12, 2003, Mr. Blackburn wrote to Linda Davidson, at CSC Regional Headquarters, Kingston, Ontario, in regards to the Health Canada evaluation. Mr. Blackburn's purpose in writing the correspondence is set out in the first paragraph, indicating to Ms Davidson he is requesting that she should not become involved in this matter.*

Ex G-47, Letter dated December 12, 2003 from M Blackburn to L Davidson.

76. *On the second page of Mr. Blackburn's letter of December 12, in the first full paragraph, Mr. Blackburn states:*

"I can assure you that the adjustment disorder described in the certificate ***does not impact on how I can perform my job as a CX-01 effectively. It did not stop me from performing my job effectively as a Police Officer with NRPS from September 1999 to December 5, 2002 and it will not stop me here."***

Ex G-47 Letter dated December 12, 2003 from M Blackburn to L Davidson.

77. *The decision to terminate Mr. Blackburn's employment was made by Milhaven Warden Jim Marshall. Mr. Marshall conveyed this decision to Mr. Blackburn in a letter dated January 16, 2004.*

Evidence of C Berry, December 14, 2004;
Evidence of J Marshall, October 3-4, 2005;
Ex G-3, Letter dated January 16, 2003 from J Marshall to M Blackburn.

78. *Warden Marshall had, back in July of 2003, after reviewing the PSSRB decision of E Henry, designated ADW Berry to manage Mr. Blackburn's reintegration and return to Milhaven. During the period between July of 2003 and January of 2004, Warden Marshall was briefed by Ms. Berry on the status of Mr. Blackburn's matter.*

Evidence of J Marshall, October 3-4, 2005;
Evidence of C Berry, December 14, 2004;
Evidence of C Berry, June 6-7, 2005.

79. *Warden Marshall stated in his evidence that throughout the period of July 2003 to January of 2004, the Employer was trying to determine if Mr. Blackburn was fit for duty or not. This would allow the Employer to determine other things.*

Evidence of J Marshall, October 3-4, 2005.

80. *Warden Marshall stated that Milhaven Institution is a Maximum Security Institution which is rated as a 500 person (inmate) capacity, which includes a 25 bed mental health wing and 100 bed segregation unit. It employs 430 full time staff of which 220 are Correctional Officers and 20-25 contract staff. In addition to being a Maximum Security facility it is also the Regional Reception and Assessment Centre ("RRAC") for all federally sentenced inmates in Ontario. This means that in addition to the inmates who are permanently incarcerated, another 1200 inmates pass through the doors of the RRAC each year, to be assessed and processed and sent to other Institutions.*

Evidence of J Marshall, October 3-4, 2005.

81. *It was important to Warden Marshall, given the decision of Madame Henry, that Mr. Blackburn was fit to return to work. The Correctional Officers at Milhaven work in a highly stressful environment and it was a safety issue for all concerned.*

Evidence of J Marshall, October 3-4, 2005.

82. *It was clear to Warden Marshall that Mr. Blackburn's lack of co-operation first in producing Physician's Certificates and later in not participating in the Health Canada Assessment procedure, that they were not getting, nor would they get, the information they required to move forward with getting Mr. Blackburn back to duty.*

Evidence of J Marshall, October 3-4, 2005.

83. *Both Warden Marshall and ADW Berry stated both in their examinations in chief in giving evidence before the Chairman, and time and time again in cross examination that they were, given all of the circumstances, concerned about Mr. Blackburn's fitness to return to work. As Warden Marshall stated in cross examination:*

> *"…that was the crux of the problem, we couldn't determine if he could do the task…I had no way of knowing if you could or could not do the tasks for mental or physical reasons…that is why we were looking for a physicians certificate."*

Evidence of J Marshall, October 3-4, 2005;
Evidence of C Berry, December 14, 2004;
Evidence of C Berry, June 6-7, 2004.

Part IV - Law and Argument

84. *Section 11(2)(g) of the* Financial Administration Act *("FAA") provides that:*

> *The Treasury Board may, in the exercise of its responsibilities in relation to personnel management, including its responsibilities in relation to employer and employee relations in the Public Service, and without limiting the generality of Sections 7 to 10, provide for the termination of employment or the demotion to a position at a lower maximum rate of pay, for reasons other than breaches of discipline of misconduct, of persons employed in the Public Service and establishing the circumstances in manner in which and the authority by which or by whom these measures may be taken or may be varied or rescinded in whole or in part.*

Financial Administration Act *(R.S. 1985, c. F-11), s. 11(2)(g).*

85. *The starting point of this case is January 10, 2002. On that date, Assistant Deputy Commissioner for Operations, Mr. Lou Kelly corresponded with the Grievor and stated in paragraph 3 of that correspondence that:*

> *"effective Monday, February 11, 2002, at 6:45 am, the Grievor is to report for work at Milhaven Institution, Bath, Ontario, for the 07:00hr to 15:00hr shift. Mr. Blackburn is to report to Brian Schwehr, the Correctional Supervisor, upon his arrival to the Institution who will instruct him as to the commencement of his reorientation for a two week period. Mr. Blackburn will receive weapons training in accordance with CSC standards and will have to bring with him his current CPR certification and valid driver's license. Mr. Blackburn will work as a CX-01 in "J" Unit unless otherwise notified".*

Ex E-27, Letter dated January 10, 2002 from L Kelly to M Blackburn.

86. *The Grievor wrote to Mr. Kelly on January 21, 2002 (Ex E-28). Mr. Blackburn indicates on page 2 of his letter that:*

> *"given the ongoing stress, the suspension from work has brought on, the ongoing fact finding into my behavior; and the mistreatment of the service and yourself has brought to bear upon me, has finally worn me out mentally and emotionally. Given my present mental and emotional state where CSC is*

> *concerned, at this time**, I am in no way fit** to perform my duties as a CX-01 in a penal institution".*
>
> ***Ex G-28, Letter dated January 21, 2002 from M Blackburn to L Kelly.***

87. *Notwithstanding the Grievor's letter of January 21, 2002, he attended at Milhaven Institution on February 11, 2002 as requested by Mr. Kelly. At that time he met with Acting Deputy Warden ("ADW") Cathy Gainer, and a Union Representative(s) Ms Barbosa. He requested a Leave Application Form, filled out the Leave Application Form and left it with ADW Gainer. The Grievor did not work that day, and after a brief stay at the Institution, meeting with the Deputy Warden and Union Representatives, he departed.*

    Ex G-1, PSSRB Decision No 166-2-20944, at paras 86, 88, 90, 93, 94, 144-150.

88. *The Grievor was terminated from his position as a CX-01 with the CSC at Milhaven Institution on February 21, 2002, effective February 11, 2002. It was this termination that gave rise to PSSRB File No. 166-2-29044 which lead to the decision of Deputy Chairperson E. Henry on June 20, 2003.*

    Ex G-1, PSSRB Decision No 166-2-20944.

89. *Ms Henry in effect reinstated Mr. Blackburn into his position as a CX-01 at Milhaven Institution, on sick leave without pay from February 11, 2002 until the date of her decision, being June 20, 2003. As at June 20, 2003, Mr. Blackburn's status with the CSC is as a CX-01 at Milhaven Institution on sick leave without pay. In her decision, Ms. Deputy Chairperson Henry makes it perfectly clear that the Employer should have followed its own policies and procedures when receiving the application for sick leave from Mr. Blackburn. The Deputy Chairperson states at paragraph 313 of her decision that:*

    > *"if the Employer had followed its own policies in dealing with sick leave and discipline, it would have requested that Mr. Blackburn submit a medical certificate. The Employer might have required that Mr. Blackburn's doctors apprise themselves of Mr. Blackburn's job description. The Employer would have informed Mr. Blackburn that his leave request was denied until he produced the proper medical documentation".*

    Ex G-1, PSSRB Decision No 166-2-20944, at para 313.

90. *At paragraph 314, the Deputy Chairperson goes on to state that:*

> *"the Employer did not even ask Mr. Blackburn to remain at work and wait for the disposition of his leave request. Mr. Kelly never advised Mr. Blackburn that the leave he requested had not been authorized, he terminated his employment instead.*

Ex G-1, PSSRB Decision No 166-2-20944, at para 314.

91. *As of June 20, 2003, Mr. Blackburn is employed with the CSC as a CX-01 at Milhaven Institution and is on leave without pay. He had been requested to return to work effective February 11, 2002, at which time he attended the Institution and requested sick leave. That sick leave was not acted upon. In July 2003, upon appraising itself of the decision of the PSSRB, the Employer does exactly as the Deputy Chairperson suggests in her decision at paragraph 313-314, and requests that Mr. Blackburn produce a medical certificate.*

92. *In correspondence dated July 24, 2003 (Ex E-4), the Employer makes it perfectly clear that it considers Mr. Blackburn on sick leave without pay, however, indicates that if he wishes to remain in that status, he is to submit a Leave Request Form with a* ***Physician's Certificate indicating that he is not fit to work****. It gives Mr. Blackburn the option that if he wishes to return to work, that he produce a* ***Physician's Certificate indicating that he is fit to return to work****. The issue is not complex, nor were the requests/instructions unclear. The Employer was requesting from Mr. Blackburn a Physician's Certificate indicating either he was sick/unfit and unable to perform his duties or that he was not sick/unfit and he was able to perform his duties.*

93. *ADW Cindy Berry was mandated by the Warden Jim Marshall to manage Mr. Blackburn's return to work and Ms Berry presented evidence in chief on December 14, 2004 and under cross examination on that same day, as well as June 6 and 7, 2005. Ms Berry, despite repeated questions in cross examination reiterated throughout her testimony on several occasions that the Employer was interested in knowing whether Mr. Blackburn was sick/unfit to return to work, or whether he was not sick/fit to return to work, and in either event was requesting a Physician's Certificate to this effect.*

94. *Warden J. Marshall who testified on October 6 and 7, 2005 stated that the Employer and he, specifically as Warden of Milhaven Institution, wanted to ensure that*

Mr. Blackburn was fit to return to work, or was unfit and qualified to be on sick leave, either with or without pay.

95. *Throughout the period from July of 2003 through to the end of November of 2003, both in telephone conversations with Mr. Blackburn, and in correspondence directed to Mr. Blackburn on at least five occasions, Mr. Blackburn was requested to produce a current Physician's Certificate indicating whether he was either fit or unfit to return to work.*

96. *The Employer gave Mr. Blackburn five to six months to produce a Physician's Certificate indicating either he was fit to return to work or unfit and should remain on sick leave with or without pay. Mr. Blackburn refused to cooperate and produce such a certificate, until November of 2003 when he visited Dr. John Yee. Dr. Yee was unable to indicate (for whatever reason) that Mr. Blackburn was either fit or unfit to work. Dr. Yee referred Mr. Blackburn back to his previous family physician Dr. Teodorini.*

97. *It is clear from the evidence that some form of falling out occurred between Mr. Blackburn and Dr. Teodorini, and as such, Mr. Blackburn did not see Dr. Teodorini in November of 2003.*

98. *Despite the lack of cooperation exhibited by the Grievor, the Employer in good faith, in an attempt to determine whether Mr. Blackburn was either fit or unfit to perform his duties, wrote to Mr. Blackburn on December 3, 2003 advising that (since he has not produced a Physician's Certificate to substantiate his absence from duty and that since the Employer has a duty to ensure that employees are able to fulfil their duties and responsibilities), they would be referring him to Health Canada for a medical assessment to determine if he is fit.*

99. *Mr. Blackburn was sent a Consent to Release of Medical Information Form and Consent to a Medical Assessment Form as well as the Health Canada Referral Protocal, a referral letter to Health Canada, and the Correctional Officer 1 Performance Standard. Mr. Blackburn was requested to execute the consents and return them such that the Health Canada assessment could be scheduled. Mr. Blackburn refused to participate in the Health Canada assessment and indicated his refusal to consent clearly, by returning the consent forms indicating he is not prepared to consent to the release of medical information, nor would he consent to a medical assessment of the release of any medical information from a medical assessment to the Employer (Ex E-18). Further, Mr. Blackburn indicated in a letter written to*

Linda Davidson at the Correctional Service dated December 12, 2003 that he would not consent to the assessment.

100. *Mr. Blackburn, in his letter addressed to his Union Advisor (Ex G-24), acknowledges on the third page in the first full paragraph on that page that:*

> *"he was aware that it was up to him to satisfy the Employer of his medical condition in a manner that may be determined by the Employer and that he would await these instructions".*

Despite this acknowledgment, when asked, Mr. Blackburn did not produce a current Physician's Certificate.

Ex G-24, Letter dated February 25, 2005 from M Blackburn to M Bouchard.

101. *Mr. Blackburn, in correspondence dated December 12, 2003, directed to Linda Davidson at the CSC Ontario Regional Headquarters (Ex G-47) by Mr. Blackburn at this hearing, states on page one in the second paragraph that:*

> *"there is no evidence in the possession of the CSC that indicates I cannot perform my job effectively. What's in the possession of the CSC was acquired through an adjudication hearing solely for the purpose of the hearing and to establish that I was not fit to work under the circumstances that was before me at the Niagara Regional Police Service (NRPS) due to an adjustment disorder".*

Ex G-47, Letter dated December 12, 2003 from M Blackburn to L Davidson.

102. *On page 2 of that same letter, Mr. Blackburn states that:*

> *"the adjustment disorder described in the certificate does not impact on how he performs his job as a Correctional Officer. He then states that: "it did not stop me from performing my job as effectively as a Police Officer with the NRPS from September 1999 to December 5, 2002 and it will not stop me here".*

Ex G-47, Letter dated December 12, 2003 from M Blackburn to L Davidson.

103. *Mr. Blackburn clearly indicated in the hearing before Madame Henry that he was unable to perform his duties as evidenced in her decision filed by the Grievor as G-1, and as indicated in his own correspondence to Mr. Kelly filed as Exhibit E-27. This is in complete contrast to his*

correspondence to Ms Davidson in December of 2003 (Ex G-47) stating that in fact he has always been fit to perform his duties and that the evidence he filed in the hearing before Madame Henry was related just to his job as a Police Officer. Mr. Blackburn then files at this hearing, ostensibly to show he is unfit, the same evidence, the Medical correspondence from Dr. Teodorini (Exhibits G-20 and G-27), Dr. Shukla (Ex G-19), and Dr. Wright (Ex G-21). In his correspondence to Ms Davidson he states that he is perfectly able to do not only his job as a Correctional Officer, but that of a Police Officer. But in January of 2002, he states he cannot, and throughout the course of his correspondence with Ms Berry, he seems to be indicating he is sick and cannot work. Indeed, he has gone so far as to file the medical reports relating to the NRSP job/dispute. One can only assume that this is to illustrate his unfitness.

104. *Mr. Blackburn states on the one hand he is unfit and cannot work (January 21, 2002 letter to Kelly, Ex E-27). He tells Linda Davidson on December 12, 2003he is perfectly fine (Ex G-47). The medical documentation a best is sparse (1998-1999, with the most recent being May of 2002), and none of it addresses his job as a Correctional Officer.*

105. *Is Mr. Blackburn sick/unfit or well enough/fit to work? Mr. Blackburn does not appear to know; or he is satisfied with adopting whatever position suits him at the time. As stated in the decision of Madame Henry, the Employer is entitled to know whether their employees are fit or not.*

106. *The United Auto Workers case is an early adjudication decision which stands for the proposition that it is an inherent right and duty of management to make certain that its employees are fit for work and this right is in no way encumbered by the provisions of a Collective Agreement. In this case when the Grievor was absent for a day and upon his return he told his foreman that he had strained his side and his doctor told him that he should take the day off, the company was fully entitled to order him to obtain a medical certificate and when he refused, suspend him until he did so.*

Re United Automobile Workers at p. 1.

107. *Arbitrator Cross went on to state in the United Workers case, that it was the right of the company to at any time require a physical or mental examination of any of its employees by the company appointed doctor if the company has reason to believe such employee (because of physical or mental illness) is a source of danger to himself, to his fellow employees or to company property,*

or is unfit to perform his duties. Having been advised by the Grievor that he suffered from a strained side and that he had seen his doctor about it and been told to stay home, afforded the company reasonable grounds upon which it exercised its right to require a medical certificate from the Grievor's doctor and the discipline imposed for the failure of the Grievor to comply with this direction was justly imposed.

Re United Automobile Workers at p. 2.

108. *Mr. Blackburn requested sick leave in February of 2002. The Employer did not act on this request nor did it request that Mr. Blackburn produce a Medical Certificate from a physician, which is their right. Mr. Blackburn acknowledged this in his correspondence to his Union Representative in February, 2002 (Ex G-24). In reinstating the Grievor, Deputy Chairperson Henry made it clear that this was the error that the Employer had committed and that they should have followed their own procedure and requested Mr. Blackburn to obtain and produce a Medical Certificate.*

109. *Throughout the period from June 20, 2003 until December of 2003, the Employer repeatedly requested of Mr. Blackburn a current Physician's Certificate to determine whether he was fit or unfit to fulfill the duties of a CX-01. Mr. Blackburn had not worked in a Correctional Facility since May of 1997, and when requested to return to work in February of 2002, maintained that he was too ill/unfit to return to work. Mr. Blackburn produced a Medical Certificate in May of 2002 indicating that he suffers from certain symptoms, however, that Certificate (Ex E-7, May 13, 2002 Teodorini letter) does not indicate whether Mr. Blackburn is fit or unfit to perform the duties of a Correctional Officer. Indeed, as of June of 2003, this certificate was thirteen months old.*

110. *The Begley case was a decision of the PSSRB which involved the non disciplinary termination of an employee for incapacity. Mr. Begley had been away from his position for four and a half years. The Grievor did not call any evidence. The Grievor's position was that the Employer could not terminate him because they could not demonstrate that he would not be able to report to work at any time in the near future. There was also no evidence that the Grievor's condition had changed.*

Begley v. TBS (PWGSC).

111. *In Begley, the PSSRB held that the Grievor was less than co operative in assisting his Employer in assessing his*

medical condition on a number of occasions throughout the period of his illness. He did little to keep his Employer fully informed of his condition or to facilitate the medical appointments that the Employer had arranged. Although the Employer may be said to have a duty to accommodate the employee, in cases such as the present one, the employee also has a duty. The Board held, quoting Justice Sopinka of the Supreme Court of Canada in the Okanagan School case:

> *"the search for accommodation is a multi party inquiry. Along with the employer and union there is also a duty on the employee to assist in securing an appropriate accommodation."*

Begley v. TBS (PWGSC) at p. 12, paras 12-13.

112. *The Board held in Begley that although the Grievor was correct in stating that "the Employer had no knowledge that he might not be well enough some day to return to his job, nevertheless, the Employer need not be certain of an employees state in such circumstances". It is well established in arbitral jurisprudence that all that is required is that the information on hand lead to the conclusion that the employee will not be able to report to work in the near future.*

Begley v. TBS (PWGSC) at p. 12, para 14.

113. *In Begley, the PSSRB made it clear that there was a duty on the employee to cooperate in assisting the Employer in assessing his medical condition. It is clear in the within case that the Employer gave Mr. Blackburn every opportunity to allow Mr. Blackburn to substantiate to the Employer either his fitness or unfitness to return to work. It is clear that Mr. Blackburn refused to cooperate over an extended period of time, and notwithstanding this refusal, the Employer referred Mr. Blackburn to Health Canada in an attempt to assess Mr. Blackburn's fitness or unfitness. Mr. Blackburn again thwarted the Employer's attempts to determine whether he could return to work. It is clear that Mr. Blackburn's own repeated actions prevented the Employer from determining whether or not he was fit or not to return to work.*

114. *Funnell v. TBS (Justice) was a case involving a Department of Justice lawyer employed in British Columbia, doing Tax litigation. Mr. Funnell had a history of psychiatric illness. He became aggressive in the workplace, and subsequently was off work with a medical certificate. He returned to work off and on. The evidence was that the Grievor was "unfit" to work.*

Funnell v. TBS (Justice).

115. *Deputy Chairman Tarte (as he then was) posed the following question in deciding this case:*

> *"the question becomes whether the Employer was justified in believing that the Grievor would not be able to return to work in the foreseeable future. That question must generally be resolved by looking at the facts as they existed at the time of the termination. The reasonableness of the Employer's decision is determined at the time of the termination on the basis of what it knew or should have known at that time. The Employer is not required to possess the wisdom that often only comes with hindsight."*

Funnell v. TBS (Justice) at p. 17.

116. *Deputy Chairman Tarte went on to state:*

> *"although I greatly sympathize w Mr. Funnell's unfortunate situation, I must conclude that the employer acted properly and reasonably at all times. It acted diligently in attempting to determine what was wrong with Mr. Funnell. To the best of its ability in the circumstances the Employer attempted to accommodate the Grievor by allowing him to return to work in a less stressful environment."*

Funnell v. TBS (Justice) at p. 19.

117. *Further, the Deputy Chairman stated that:*

> *"the Employer's responsibility to properly assess the nature of an employee's illness and the duty to accommodate require comparable responsibilities and duties on the part of the employee and, perhaps in some cases, members of his family and treating medical professionals. The Employer's efforts to assess the Grievor's problems were thwarted at every turn by the Grievor himself. Nobody with relevant information came forth in a timely manner to clear up the situation. Furthermore, a person requiring accommodation or those close to him must be forthcoming in telling the Employer in what manner accommodation can take place. Accommodation is a two way street which requires good-will and participation from both the employee and the Employer."*

Funnell v. TBS (Justice) at p. 19.

118. *At the time, Mr. Funnell was terminated, the circumstances were such that the Employer was justified in its assessment that the grievor was incapable of performing the duties of his position and that he would not be able to do so in the foreseeable future.*

Funnell v. TBS (Justice) at p. 19.

119. *In the decision of McCormick v. TBS (Transport), the Grievor went on sick leave in June of 1992. The Grievor was assessed at the request of the Employer by Health Canada, and it was determined that he was suffering from depression. He returned to work in November of 1992 and was assigned to special projects. In April of 1993, he went on sick leave again until June of 1994 when he was terminated for medical incapacity. While he was on sick leave between April of 1993 and June of 1994, he was assessed on two occasions by Health Canada. Both assessments stated he was suffering from severe depression and was unfit to work. The second assessment conducted in May of 1994 found that it was unforeseeable as to if or when he could return to work.*

McCormick v. TBS (Transport).

120. *The Board dismissed the grievance as against the termination. In rendering his decision, Deputy Chairman Tarte (as he then was) stated that:*

> *"An Adjudicator in a case such as this one must look primarily at the facts in existence at the time of the termination. Since terminations pursuant to sub-section 11(2) of the* Financial Administration Act *are for cause, the Employer is required to properly assess the situation prior to termination. That assessment must take into account any information reasonably available which might indicate a probable return to work in the foreseeable or near future."*

McCormick v. TBS (Transport), at p. 19.

121. *Deputy Chairman Tarte went on to quote from the City of Sudbury case:*

> *"An Employer must be entitled to terminate an employment relationship for blameless absenteeism when the grievor's past record is sufficiently poor and all signs indicate that the grievor will be incapable of acceptable attendance in the future. From the standpoint of fairness and finality, it is inappropriate to make the propriety of the Employer's decision to terminate subject to continual review, depending on the fortunes of medical treatment or on other events*

> *that develop in the months or years following the date of discharge. In the Boards opinion, the proper balancing of the interests of the Employer and employee is to give finality to the Employer's decision if at the time of discharge the Employer correctly concluded on the basis of all the facts then reasonably available that it was unlikely that the grievor would be capable of regular attendance in the foreseeable future."*
>
> ***McCormick v. TBS (Transport), at p. 20.***

122. *As stated by Deputy Chairman Tarte (as he then was), in both the McCormick and the Funnell cases, an Adjudicator in cases such as these must look primarily at the facts in existence at the time of the termination.*

123. *At the time of the termination of Mr. Blackburn, what was clear is that the Employer used all means available and exhausted all means available to determine whether or not Mr. Blackburn was indeed fit or was not fit to return to work. Had Mr. Blackburn cooperated with the Employer, this question could have been answered as far back as the summer of 2003. Either Mr. Blackburn's physicians determined that he was fit to return to work and as such could have returned to work, or they would have indicated that he was unfit to return to work. If that determination was made, Mr. Blackburn could have used sick leave credits which had accumulated, and potentially stayed on sick leave without pay.*

124. *The Employer was justified in making the request of Mr. Blackburn for a Physician's Certificate since Mr. Blackburn said he was sick and unfit in January (Ex E-28) and February of 2002, and requested sick leave back in February of 2002. There was nothing to indicate in the interim (February 2002 to June of 2003) that Mr. Blackburn was either fit or unfit to carry out the functions as a Correctional Officer.*

125. *Given the actions of Mr. Blackburn in early to mid 2002:*

    1. *his correspondence to Deputy Commissioner Kelly of January 21, 2002 stating he is "unfit" (Ex E-28);*

    2. *his attendance on February 11, 2002 at Milhaven Institution and requesting sick leave (Ex G- 1 and G-2);*

    3. *his filing of medical certificates during the hearing before Madame Henry (Ex G-1, paras 43, 88, 93, 94, 97, 98, 103, 123-125, 127, 148, 150, 154-157, 159, 162, 167-170, 232, 233);*

4. *his position before Madame Henry that he was unfit (Ex G-1, paras 43, 88, 93, 94, 97, 98, 103, 123-125, 127, 148, 150, 154-157, 159, 162, 167-170, 232, 233),*

and post June of 2003:

1. *his request for sick leave in August of 2003 (Ex E-7);*

2. *his repeated and continuous request for sick leave after June of 2003 (Ex E-7, E-11 (p.4), E-12 (p.6), and E-17 (pp.7, 8 and 9)).*

3. *That the requests for sick leave were not for 1 or 2 days duration but for long extended periods, often for more than a year, and in one instance for almost 3 years (910 days) (Ex E-17, p.7),*

it was reasonable for the Employer to assume that Mr. Blackburn may be ill, sick/unfit, or otherwise unable to perform the duties and request for him to produce a Physician's Certificate.

126. *Indeed, what has come to light since that time is that Mr. Blackburn has indicated that he is not sick or unfit and never has been (Ex G-47, correspondence dated December 12, 2003 to Linda Davidson). This is in direct contradiction to the correspondence he wrote to Mr. Lou Kelly in January of 2002 refusing to return to work as he was sick and unfit to return to work. This is also in direct contradiction to all of the sick leave requests he has made from February of 2002 forward until his termination.*

127. *It is unclear as to whether Mr. Blackburn is sick or not, or fit or not. In what appeared to be an attempt to show this Board that he was ill/unfit, and unable to work, the Grievor filed three Medical Certificates/letters from physicians dated 1998 and 1999, some six to seven years ago. These letters all indicate that Mr. Blackburn is suffering from some form of a "stress disorder" relating to his working relationship with the Niagara Regional Police Service. There is nothing in any of those letters that relate to being able or unable to work as a Correctional Officer.*

128. *Notwithstanding the requests by the Employer to produce a Physician's Certificate between June of 2003 and January of 2004, after his termination Mr. Blackburn did not produce any medical evidence indicating whether he was fit or unfit to return to duty. It should be noted that in the prior hearing before Deputy Chairperson Henry, subsequent to his termination in February of 2002,*

Mr. Blackburn obtained a Medical Certificate dated May of 2002, which certificate incidentally appears to by the last Medical Certificate obtained by Mr. Blackburn and which certificate Mr. Blackburn seems to rely upon to illustrate is inability to return to work during the course of that hearing. Indeed, this is the same Certificate that Mr. Blackburn maintains throughout the period of June 2003 to January 2004, is appropriate to satisfy the Employer he is unfit.

129. *Mr. Blackburn had within his possession in Kingston, in the trunk of his car, his entire medical file from Dr. Teodorini, which he refused to produce at the within hearing which may have shed some light on his medical condition. There has been no medical evidence whatsoever any more current than May of 2002 indicating whether or not Mr. Blackburn is in any way, shape, or form fit or unfit to perform his duties as a Correctional Officer.*

130. *The case of Ricafort v. TBS (DND) involved an employee who was suffering from stress on the job and who took sick leave. Mr. Ricafort produced a medical certificate which indicated that he was fit to return to work. The Employer met with Mr. Ricafort and was somewhat concerned and requested that the employee be assessed by its own doctor at Health Canada. The Grievor was reluctant and obtained a second medical certificate from a psychiatrist. The Employer was not satisfied and reasserted its position that the grievor see a Health Canada Doctor. The grievor went to see the Health Canada physician who declared that he was fit to return to work. The Grievor filed a grievance with respect to the sick leave he used while off work, despite being declared fit by his own medical professionals.*

Ricafort v. TBS (DND).

131. *Deputy Chairman Chodos, in dismissing the grievance, found that the substantive factual issue in this case is whether the employer had sufficient grounds for questioning the fitness of the Grievor to return to work, notwithstanding his apparent request to do so. He found that even in the face of the Medical Certificates provided by the Grievor, there were ample reasons for the Employer to doubt the Grievor's fitness to perform his duties and to conclude that by returning to work the employee might be further jeopardizing his health. Given the Grievor's own equivocation about the state of his health throughout the period in question, it was entirely reasonable for the Employer to err on the side of caution in requiring the Grievor to submit to a further medical examination as a condition of his return to work. In*

addition, the tenor and content of the memoranda composed during this period by the Grievor understandably led management to conclude that the Grievor continued to suffer quite profoundly from the accumulated effects of stress.

Ricafort v. TBS (DND) at p. 14.

132. *In Ricafort, during the course of the evidence, the Grievor suggested that he was the victim of a conspiracy to remove him from the workplace. Deputy Chairman Chodos rejected this suggestion, finding that there was simply no cogent evidence to support this contention. He found that the Employer's actions were motivated by nothing other than a concern for the Grievor's health and his capacity to perform the duties as required.*

Ricafort v. TBS (DND) at p. 14.

133. *Deputy Chairman Chodos held that the Employer had the authority to act as it did, as in his view the preponderance of arbitral jurisprudence supported the Employer's position. In fact, virtually or explicitly all of the decisions recognized that the Employer had the authority and indeed the obligation in certain circumstances to prevent an unfit employee from returning to work. In quoting from the Kelly decision, Deputy Chairman Chodos states:*

> *"in my opinion it is an inherent management prerogative as part of its responsibility for directing personnel, confirmed by the provisions of section 7 of the* Financial Administration Act, *as well as Article 6 of the Collective Agreement, to relieve an employee of his duties on receipt of medical advice that he is unfit to perform them."*

Ricafort v. TBS (DND) at p. 14.

134. *In Trépanier v. TBS (Agriculture), the Grievor was suddenly ill following a grievance hearing. Mr. Trépanier produced a medical certificate from his own physician. The Employer put no faith in the certificate and requested that Mr. Trépanier attend and undergo a separate medical examination by a physician of the Employer's choosing.*

Trépanier v. TBS (Agriculture)

135. *Vice Chairman Cantin decided that the Employer had the right to decline to accept the report of Mr. Trépanier's attending physician and require him to attend and undergo an examination by a physician of their choosing.*

The Grievor merely had to comply with the Employer's request. He was obliged to allow his own doctor to provide information to the doctor chosen by the Employer. He had no reason to refuse, even though personal matters may be the reason for the absence.

Trépanier v. TBS (Agriculture) at p. 4.

136. *It was the decision of the Vice Chair that the Employer had all the more reason to ask the Grievor to "Satisfy" it of his condition because of the sudden onset of his illness at the conclusion of the grievance hearing. Clearly the Employer had the right to doubt the Grievor's claim and the Adjudicator could find no fault with the Employer for doing so.*

Trépanier v. TBS (Agriculture) at p. 4.

137. *Under the terms of the Collective Agreement, the Employer can certainly grant sick leave with pay without requesting any details or asking the employee to undergo another medical examination. However if it decides to deny leave without obtaining additional information, the employee must satisfy the Employer of his condition at such time as may be determined by the Employer.*

Trépanier v. TBS (Agriculture) at p. 4.

138. *The purpose of the sick leave policy and the Articles contained in the Collective Agreement is to protect an employee's earnings from public service employment when unable to work by reason of a non-occupational illness or injury. The Employer as it is stated in its Policy (Ex E 22) gives full recognition to the need for sick leave for employees and this recognition is a reflection of genuine concern for the welfare of employees.*

139. *Sick Leave is a benefit that is intended to protect an employee's income when the employee is incapable of performing his or her regular duties, due to non-occupational illness or injury. The existence of sick leave credits has never been, and is not intended to relieve the employee of the obligation to render normal service when the employee's state of health is such that he or she may reasonably be expected to do so.*

140. *Sick Leave is contingent upon illness or injury and is not a kind of additional vacation or time off work for other reasons of a personal nature. It is designed for the limited stated purpose of providing continuity of income during absence from work due to non-occupational illness or injury.*

141. *The Collective Agreement sets out in Clause 31.03 that unless otherwise informed by the Employer, a statement signed by the employee stating that because of illness or injury he or she was unable to perform his or her duties, when delivered to the Employer, be considered as meeting the requirements of 31.02(a) of the Collective agreement which states that an employee will be granted sick leave with pay when he or she satisfies the Employer of the condition that makes it unable to perform his or her duties, in such manner and at such time as may be determined by the Employer.*

142. *What is clear from the Ricafort and Trépanier cases, is that the employer is entitled to require the employee to produce satisfactory documentary medical information that satisfies the employer that the employee is either fit to carry out the duties of his or her position, or that he or she is unfit and entitled to avail themselves of the benefits conferred either by legislation and/or policy or by Collective Agreement. They state that the employee's lack of co-operation in satisfying the employer of their fitness or unfitness can risk them their jobs.*

143. *Campbell v. TBS (CRTC) was a decision rendered in 1996 by Deputy Chairperson Tarte (as he then was). It involved the non-disciplinary termination of an employee who suffered from chronic mental illness. The illness could be and was controlled by medication, however when he went off his medication, his behaviour deteriorated to the point where he was increasingly insubordinate. The employer eventually denied him access to the workplace pending his assessment by Health Canada that he was fit to return to work*

Campbell v. TBS (CRTC).

144. *In denying Mr. Campbell's grievance from termination, Deputy Chairperson Tarte stated at para 61:*

> *"An employer who has serious reasons to believe that the physical or mental condition of an employee is such that the employee cannot adequately perform the duties of his or her position or who has reason to believe that the condition of the employee may affect the health and security of others, may require that the employee submit to a physical or psychiatric medical examination by a specialist of its choice as determined by National Health and Welfare Canada. In such circumstances, an employee who refuses to abide by the employer's request, does so at his or her own peril."*

Campbell v. TBS (CRTC), at para 61.

145. *Deputy Chairperson Tarte went on to state at para 62:*

> *"To this day Mr. Campbell appears to be incapable of properly dealing with his chronic illness. Two years after his termination, the grievor continues to refuse to accept the reasonable request of his employer to follow a treatment program that would be acceptable to National Health and Welfare Canada."*

Campbell v. TBS (CRTC), at para 62.

146. *Mr. Blackburn has been given every opportunity to establish whether or not he is either fit or unfit to return to work. When he was not cooperating, and when it appeared that the information would not be forthcoming, the employer arranged for a Health and Welfare assessment, to which Mr. Blackburn made it perfectly clear he was in no way going to consent to or attend.*

147. *The employer is left hazarding to guess as to whether Mr. Blackburn is fit or unfit. This is simply unacceptable in determining if an individual is fit or not fit to work in the potentially volatile surroundings of a maximum security penal institution. If this was not in and of itself enough, the employer is faced with no medical evidence that is current and contradictory statements made by the grievor himself that he is not fit (Ex 's E-7, E-11, E-12, E-17 and E-28) and that he is perfectly fit (Ex G-47).*

Part VI – Order Requested

148. *The Employer respectfully request that the grievance be dismissed. In the event that the Chairman elects to reinstate the Grievor, the Employer respectfully requests the opportunity to make further submissions regarding the reinstatement of pay and benefits.*

PART VII – LIST OF AUTHORITIES

1. Financial Administration Act, *(R.S. 1985, c. F-11), s. 11(2)(g).*

2. *Re* United Automobile Workers v. American Standard Products (Canada) Ltd., *(1959) 9 L.A.C. 283.*

3. Begley v. TBS (PWGSC), *[1996] C.P.S.S.R.B. No. 38.*

4. Funnell v. TBS (Justice), *[1995] C.P.S.S.R.B. No. 83.*

5. McCormick v. TBS *(Transport), [1995] C.P.S.S.R.B. No. 92.*

> *6.* Ricafort v. TBS (DND), *[1988] C.P.S.S.R.B. No. 321.*
>
> *7.* Trépanier v. TBS (Agriculture), *[1987] C.P.S.S.R.B. No. 34.*
>
> *8.* Campbell v. TBS (CRTC), *[1996] C.P.S.S.R.B. No. 35.*
>
> [*Sic* throughout]
>
> [Emphasis in the original]

[74] The submissions on behalf of the grievor are as follows:

> *1) This is a case that evolved from an adjudication decision (File No. 166-2-29044 and 166-2-31467) that was rendered on June 20, 2003, in favour of the Grievor, Meichland Blackburn, after it proceeded through the grievance process, in keeping with dispute resolution protocol under the collective agreement and the* Public Service Staff Relations Act.
>
> *Further, a case where the employer has refused to accept the decision of Madame Henry because of political differences and fear of the grievor, which led the employer to implement a underhanded strategy of revisiting the same sick leave without pay request of February 11, 2002 with the goal of terminating his employment a second time under the cover that this is what Madame Henry informed them to do.*
>
> *2) The original decision ordered reinstatement of Meichland Blackburn, CO1 of Millhaven Institution, with specific rights and privileges from* ***June 1, 1998 to date of receipt of the decision and where he, (at a time of his own choosing, in keeping with his original request for sick leave without pay, as to when and how his return to work will come about), shall submit to the employer a medical certificate evidencing/stating that <u>he's fit for duty or fit to return to work</u>.***
>
> ***(****emphasis added here and throughout are those of the grievor****)***
>
> *3) Next, this is also a case where the Employer had no reasonable grounds or justification to request from Blackburn a current medical certificate indicating he's* ***not fit to return to work*** *because (i) he was not ordered back to work by Madame Henry immediately upon receipt of her decision, (ii) he was not returning to work until the resolution of the criminal charge and until declared fit to return to work by a physician, (iii) more importantly,* ***he was not reinstated from an absence on sick leave, with or without pay, in keeping with the collective agreement—article 31****,*

(iv) and to add insult to injury the employer requesting a certificate from Blackburn immediately upon being notified of his reinstatement on ***sick leave without pay*** *rather than allowing six months or reasonable time to pass/elapse, in keeping with their own policy, practice and good management of sick leave, knowing the circumstance surrounding his absence and reinstatement.*

4) Further, this is a case where the Employer had no reasonable grounds or justification to request from Blackburn his consent to a medical examination with Health Canada on the basis that (i) the employer had no information or way of knowing whether Blackburn was fit or not to return to work, and/or (ii) that he failed to provide to the employer's satisfaction a medical certificate indicating his lack of fitness to return to work when he ***had not requested a return to work, was not asked or ordered to return to work*** *and* ***was not requesting sick leave*** *(with or with out pay) in keeping with the collective agreement or applicable statute.*

5) Lastly, a case where the employer had no reasonable justification or grounds to terminate Blackburn's employment on the basis that he did not cooperate with the employer's request to provide a medical certificate or to voluntarily consent to a Health Canada Assessment and then to terminate his employment without following procedural fairness and the duty to act fairly. And in so doing, disguising the disciplinary action taken under the heading Non Disciplinary Termination for Cause in an effort to circumvent the standards, policies, rights and obligations of the applicable statutes, case law and collective agreement they had to meet before terminating his employment.

Case for the Grievor with Arguments and Supporting Cases

6) It is important to understand that the Employer can only request from its employees a medical certificate to satisfy the employer of the employee's condition in accordance with the relevant authority, which includes the collective agreement (Article 31) or the appropriate terms and conditions of employment when employees are (i) requesting sick leave with pay, (ii) returning from booking off sick (normally more than three days of absence), whether authorized or not, (iii) a safety issue has been raised regarding the employee's continuance in the workplace/workstation or (iv) a competence/safety issue as been raised prior to his or her return, whether from an absence of sick leave or not.

No authority or Article exited to the contrary at the time of the Employer's request and/or subsequent termination of grievor's employment and this was confirmed by the

Employer (Berry and Marshall). The collective agreement does deal with sick leave with pay (Article 31) and not with sick leave without pay. The Grievor suggest the reason for its absence from the c/agreement is a matter of common sense, in that the Employer in approving such leave suffers no harm financially.

The issue of safety was raised for the first time by Marshall at the hearing and if you search through all of the written correspondences to Blackburn from the Employer you will observe that the safety issue was not raised and is clearly absent from their written correspondence.

There was never a concern for safety raised at either of the following: the first adjudication hearing as evident in G1; it was never an issue that led to the initial request in E4 for a medical certificate and as noted in E3, E5, E10 & E13; it was never an issue throughout the grievance process in the employer's reply at each level of the grievance process (G45); it was never an issue commencing from June 20, 2003; and more importantly, it was never cited as one of the reasons for the termination of employment in G52 (termination letter of January 16, 2004).

A review of E17, more so the letter from Berry to Davidson dated December 3, 2003, cannot now be used as evidence that the issue of safety was raised and made aware to Blackburn. As a matter of fact, E17 was not testified to or confirmed as such by either Marshall or Berry and of importance it was not a point of argument in Mr. Jaworski's (legal counsel) case presentation.

In reviewing this letter you will note that the questions the employer specifically wanted to address did not mention the issue of safety but rather 'whether or not Blackburn has the capacity to fulfill his obligations as outlined in the Performance Standards and second are there any areas of capacity/incapacity that will need to be addressed through accommodations of duty'. To now argue as such by the employer at this late hour is not acceptable, would be in violation of natural justice and due process and therefore should not be allowed by you.

7) On June 20, 2003, following a highly emotional and contested adjudication hearing, a decision was rendered in favour of the grievor, Meichland Blackburn, wherein he received but not limited to the following: ***entitled leave credits, seniority and pension time.*** *In addition, he was* ***'ordered on sick leave without pay until he submits to the employer a certificate from his doctor indicating that his doctor, apprised of his work description, confirms that he***

is fit for duty (paragraph 320 of G1) rather than unfit for duty.

The Employer, as a result of this order is prohibited by the PSSRA at section 91to revisit this issue and can only do so by way of Judicial Review in the Federal Court of Canada. To do so would render the grievance and adjudication process useless and irrelevant to put it mildly.

*Once the **order** was given it was to be adhered to by the employer and they failed to do so by erroneously claiming that the submitting of the amended sick leave without pay for an indefinite period, dated August 4, 2003, (along with subsequent submissions in various manner on the same subject over the six month period), by Blackburn was his adherence to paragraph 320 and as a result of this adherence they were adhering to paragraph 322.*

As you are now keenly aware it was the employer who requested the submission of the updated sick leave without pay request form in E4 and not Blackburn, who submitted it for the purpose as requested and not for requesting or seeking an absence from work through sick leave without pay as asserted by the employer.

Of importance here that you must not overlook, to which the employer clearly did, is the word UNTIL and the phrase CONFIRMS THAT MR. BLACKBURN IS FIT TO RETURN TO DUTY.

No such certificate was ever presented by Blackburn confirming that after his doctor were apprised of his job description confirm that he his fit to return to duty for the employer to invoke the challenge as set out in paragraph 322 in G1, and no certificate was presented by the employer as evidence of this.

*A reminder to you Sir that the May 13, 2003 certificate **was introduced/submitted along with the Leave form solely for the purpose of securing a payout/cash-out for restored sick leave credits from the date of February 11, 2002 to their expiration,** to which the date(s) of February 11 and or 21, 2002 is indicated in paragraph 300, 301, 321 and 329 of G1 and in the second paragraph of page 2 in E24 (letter from Wendy Smith of Compensation to Blackburn, dated July 17, 2003---a day after the July 16, 2003 conversation between Blackburn and Berry.*

*Further, the grievor was also **ordered on sick leave without pay status, in keeping with his original request that was made on February 11, 2002 until the date of receipt of the decision or until declared fit to return to work (G1-paragraph 320 and 329).** The portion **"or until declared***

fit to return to work" *cannot be separated or dismissed from the entire statement in the context under which it was made, to which the employer has done when they assert at the hearing that the submission of the May 13, 2002 certificate* ***was Blackburn's way of confirming he was fit to return to work as of June 20, 2003, thus worthy of challenge and that he did not submit it for the purpose of securing a payout of his earned leave credits as he testified to.***

8) Upon receipt of the decision by the grievor on or about July 8, 2003, the grievor contacted his Employer at Millhaven Institution on or about July 16, 2003. In so doing, he conveyed to Ms. Cindy Berry, whom at the time was Acting Deputy Warden and the employer's point person with Blackburn (which he did not no at the time until the evidence of Berry at the hearing) that he had in fact received and reviewed the decision of Chairperson Henry. As such, he requested ***Parental Leave*** *and to have his* ***Annual and Sick Leave credits paid out in cash*** *along with discussions on other related issues that were not captured in Berry's notes, which at the hearing were purported to be made contemporaneously at the time of each telephone conversation with Blackburn.*

I will address Berry's note-taking solely for the purpose of pointing out certain deficiencies and not to give it any importance or credence because nothing turns on it that benefits the employer. The fact that Blackburn did not challenge what was written down as inaccurate does not diminish or extinguish your discretion to view the notes as incomplete and inaccurate since there was no corroborating evidence introduced other than Berry's own assertion that they were recorded verbatim. Further, no other evidence was introduced in examination-in-chief to corroborate what Berry wrote down as notes was in fact precise and covered all that was discussed between Blackburn and herself.

9) After the July 16, 2003 telephone call Blackburn recalls receiving a letter and a package (E24) from Compensation and Benefits before July 24, 2003, advising him that he was eligible for Disability Benefits, how to go about securing it if he so choose and that he had to complete and submit a request form for any sick or annual leave paid or unpaid that he may wish to use from February 11, 2002.

10) By way of a letter (E4) from Cindy Berry, dated July 24, 2003, he was informed of the following three points but not limited to: 1) "Currently, you are on authorized sick leave without pay. It is essential that ***an updated leave request form*** *(attached) be submitted to Millhaven Institution* ***reflecting your current status****. 2)* ***If you wish to continue with sick leave (without pay or with pay, using the adjusted sick leave credits)*** *the leave request form must be*

accompanied with a physician's certificate (attached) ***indicating that you are <u>not fit</u> to return to work****. 3)* ***In the event that you wish to return to work, a physician's certificate is required indicating that you are <u>fit for duty</u> prior to your return.*** *Please submit your updated leave request form and physician's certificate to me by 11 Aug 03."*

It is important Sir for you to recognize that the updated leave form ***<u>as requested by the employer,</u>*** *at the time,* ***was to reflect Blackburn's current status*** *and* ***not a request by Blackburn for sick leave without pay*** *as* ***argued*** *by the employer but* ***not argued or asserted*** *by the employer that* ***it was a request from Blackburn to continue on sick leave without pay****.*

The phrase, if you wish to continue on sick leave.clearly gives Blackburn the option of choosing, to which he did not exercise and rightly so since he was already on sick leave without pay and was not seeking to change that status to sick leave with pay. Further, no notice was given to him indicating he must choose one or the other and failure to do so would lead to a revocation of his sick leave without pay status and/or disciplinary action may result.

The only other option other than a pay out for Blackburn was to accept sick leave with pay, either commencing from June 20, 2003 or from June 1, 1998, the date is sick leave started to accrue, and even if he did choose this option the same scenario would be facing the employer if the start date was from June 1, 1998, in that a current certificate would not have been applicable since Blackburn was not on sick leave on or from June 1, 1998. If the date was from June 20, 2003, it can be argued sensibly that a certificate was required to satisfy the employer of the employee's condition in order to have the leave approve if a request for sick leave with pay was in fact requested. However, lets' not confuse these two with respect to an employee requesting sick leave for a particular period, while on duty or not, on the one hand with a request made by the employer for a medical certificate to substantiate whether an employee is fit or unfit to return to work as alluded to at paragraph 6 of this submission.

11) Upon receipt of this letter (E4), it became obvious to Officer Blackburn (grievor) that this letter, in part, was not clear but confusing, and that Ms. Berry did not have a complete understanding of Henry's decision. What is meant by this is as follow:

(i) Blackburn understood what was being asked of him with respect to providing an updated leave form since the original had been misplaced, lost or destroyed by the previous Warden (Lou Kelly) and/or his

management team in February 2002. Officer Blackburn in fact provided an updated sick leave without pay application as requested in the timeframe allowed (E7-Aug 4, 2003), albeit the application was not completed correctly in that the Sick Leave Declaration area should not have been signed and dated and this applied to G2 (original sick leave without pay leave form) as well, since no absence on sick leave occurred, to which the employer did not catch or willfully overlooked for their own use/purposes at a foreseeable hearing which eventually came about. Nowhere in this letter (E4) was Blackburn informed that it was essential that an updated leave form be submitted for any other purpose which led him to rightfully conclude that it was needed for record keeping purposes, that being to account for the order given in Henry's decision. At the time of the request it was his belief that the request was made simply for record keeping purposes and not for the purpose of now deciding whether or not to approve the original sick leave without pay request of February 11, 2002, which was already raised and decided on by Chairperson Henry. Clearly, Blackburn did not make an offer to update his current status by submitting an updated sick leave without pay form upon receipt of the decision or after speaking with Berry and this was not argued by the employer. Blackburn believes now that the latter purpose was indeed the employer strategy from the beginning which they did not share with Officer Blackburn for obvious reasons. In any event, this strategy when forced out of the dark and into the light revealed itself to be ***an artifice/ruse of the lowest form to which the employer has and will stoop to in their efforts to get rid of employees, especially Black employees they politically cannot control.*** *Now that it has been revealed for what it is it is on course for ruin because its' foundation is predicated/built on shaky and unsupported grounds, those grounds being that Officer Blackburn had requested sick leave (an absence from work) on more than one occasions and in different ways upon receipt of the decision, to which you now know is not accurate.*

(ii) He understood that the medical certificate accompanying the sick leave option as put forward by the employer, if said suggestion was followed by Officer Blackburn, was dealing with sick leave with pay and not without pay, since there is no provision in the collective agreement dealing with sick leave without pay or authorizing its production when

requesting sick leave without pay and no documentary evidence was conveyed or given to Blackburn to assist him with his decisions. The evidence clearly demonstrates without any ambiguity or confusion that Officer Blackburn ***never requested sick leave with or without pay upon receipt of Henry's decision in accordance with Article 31 or any other article of the collective agreement, legislative authority or condition of employment*** *contrary to the evidence espoused by the Employer. He had no need to since he was currently/already on sick leave without pay as per Henry's decision (E4) and he was not seeking a continuance of his sick leave without pay status by way of a request. And no evidence was introduced by the employer showing Blackburn requesting a continuance of sick leave without pay prior to, on or after June 20, 2003.*

To argue he did by the subsequent submitting of sick leave forms is inaccurate and disingenuous when they had full knowledge of the actual reasons why other sick leave forms were submitted and submitted under protest. In reviewing E3 and E4 you will note that there is no mention that Blackburn requested sick leave, with or without pay in accordance or not with Article 31 and no mention he requested a continuance of sick leave using his adjusted sick leave credits from Cindy Berry during their telephone conversation on July 16, 2003 or thereafter. Any subsequent sick leave forms submitted after his receipt of E4, whether certified or uncertified, whether sick with or without pay, ***was done solely for the purpose of getting his sick leave credits paid or cashed-out and not for the purpose of requesting/seeking an absence from work (sick leave without pay) to which he was already on.*** *According to the grievor's witness, CO2 Devoe Dyette, in examination-in-chief and on cross examination, he stated 'the normal practice of CSC is to request a certificate upon the return of the employee to work after an absence of more than three (3) days when dealing with sick leave with pay and not sick leave without pay and in the present case Blackburn was not on authorized sick leave whether with or without pay from February 2002 to the date of the decision.' Therefore, it cannot be argued logically or successfully that the employer had the right to ask for a medical certificate as a result of Blackburn's absence from February 11, 2002 to June 20, 2003, and this is further buttress/supported because a) his absence, which was directly attributable to his employment being terminated and not as a result of taking sick leave, is insufficient*

*grounds to base a request for a medical certificate of fitness (***Grover vs National Research Council of Canada*****, *PSSRB, 2005/10/03)*** *especially under the circumstances of Blackburn's termination in 2002 and his reinstatement in 2003, b) Blackburn's absence was a direct result of his employment being terminated by then Warden, Lou Kelly, notwithstanding he had requested sick leave without pay commencing from February 11, 2002 to indefinite which was not approved, c) Blackburn was not an employee subject to the collective agreement or terms of condition of employment as of February 11, 2002 and d) if the employer was truly concerned about Blackburn's health, to which they make mention of at the hearing but not in any correspondence to Blackburn, they would have inquired about it during that period, notwithstanding that he wasn't an employee. Now coupled with the fact that they were fully cognizant that he might be reinstated, which in fact was conveyed to the employer in October 2002 during cross-examination of then Warden Lou Kelly by Chairperson Henry. Through out this present dispute it was never Blackburn's position (initial or otherwise) that he was going to use his adjusted sick leave credits from June 20, 2003 onwards to which he conveyed to his employer by telecommunication and written correspondence (E19). Further, he found it rather confusing as well in that he's being told '****if he wished to continue on sick leave he had to provide a medical certificate.****' He was ordered on authorized sick leave without pay as of June 20, 2003, in part, on the strength of the May 13, 2002 certificate (E7) including other medical evidence (G19, G20, G21), yet knowing this fact the employer still requested a certificate, not after six months of his reinstatement but rather immediately after his initial contact with them, all the while being fully aware of how his present status on sick leave without pay came about. As the arbiter it's important for you to recognize exactly what the employer is asking or requesting of Blackburn in E4, namely, "****if you <u>wish</u> to continue on sick leave (without pay or with pay, using the adjusted sick leave credits)*** *you have to provide a certificate stating* ****you're not fit to return to work."*** *Of note is the fact that the employer did not state that if Blackburn wished to continue on sick leave, with or without pay, he must provide a medical certificate showing he's not fit to return to work* ****and failure to do so would result in his sick leave without pay being revoked/cancelled resulting in him being put on leave without pay status,*** *which is what they indirectly implied at the hearing, but failed to*

*mentioned to Blackburn throughout the **six** month period. It is clear from the evidence that he did not wish to use his sick leave credits in this manner to which he was entitled without repercussion. Blackburn was **entitled** to use his sick leave credits from February 11 or 21, 2002 to the date of receipt of the decision **or elect** to use them from the date of receipt of the decision until the date he his declared fit to return to work (G1 at paragraph 321). All of his submitted sick leave request forms (E12 & E17) reflected dates commencing from February 2002, June 1, 2998 or after June 20, 2003, all of which were submitted to **secure cash-out of his sick leave credits and not to request an absence from work**. **In any event it was not until he was advised that he would not be getting a cash-out for his sick leave credits unless he provided a current medical certificate that prompted him to submit the May 13, 2002 certificate, under protest and over his objection, and subsequently sick leave forms (E12 & E17), with and without pay as requested but not approved**, to which he testified to and the evidence indicates. Further, one would have to be a fool or willfully blind and deceitful to argue and conclude that the May 13, 2002 certificate was submitted by Blackburn as evidence that he's **fit to return to work in keeping with paragraph 320 of the reinstatement decision (G1**) and in the face of the overwhelming evidence contained in G1, respecting the reason outlined for its submission at the Henry hearing and further at G22, G23, G25 & G26. The employer through Cindy Berry and Jim Marshall when questioned on this point took the May 13, 2002 certificate as evidence that it was being submitted as proof that Blackburn was fit to return to work and therefore grounds to **challenge it**, not on its validity or authenticity, but on the basis that it did not state whether Blackburn was fit or unfit to return to work. Clearly, the employer knew that the May 13, 2002 certificate (E7) was produced/authored solely to address Blackburn's termination in February 2002 on the advising of his Union President, Sylvain Martel and introduced as evidence for the purpose of demonstrating that Blackburn was indeed **not fit for duty with CSC** (G22 & G23), contrary to the employer's present argument and this fact was conveyed to Berry by Blackburn through telecommunication and written correspondence. A reminder to you Sir that Blackburn was dealing with **two employers**, the Niagara Regional Police Service and the Correctional Service of Canada and no other, where is fitness was in issue, which was not disputed*

by the Employer (Treasury Board and CSC). So for the employer to question the May 13, 2002 certificate on the basis that it was not address to them because it states To Whom It May Concern rather than Corrections Canada and does not specifically set out the phrase fit or unfit to return to work is not only incredible it not worthy of belief, especially in the face of the evidence outlined in G1 and testified to by Blackburn and acknowledge by their lawyer, Mr. Jaworski, during cross examination of Blackburn that the May 13, 2002 certificate was indeed introduced at the previous hearing by the grievor has evidence of Blackburn's lack of fitness to return to work where CSC was concerned. To Whom It May Concern speaks for it self, covers those it is sent to and it cannot be dismissed under the circumstance through a lame excuse put forward by the employer. If it is now the employer's position at this late hour in the process that they were notifying Blackburn that his continuance on sick leave without pay would terminate if he did not use his adjusted sick leave credits and therefore be put on leave without pay status instead, they should have done so in plain and clear language at that time and not at the hearing. They failed to convey this to Blackburn in their letter (E4), subsequent letters and telecommunications. You cannot take the following particular wording out of context and thus dilute or water-down it's meaning to fit a particular belief put forward by the employer. The wording ***"without or with pay, using the adjusted sick leave credits"*** *must be read in full and in the context in which it was written which led to Blackburn's understanding.* ***Blackburn reiterates that it was not his wish to continue on sick leave using his adjusted sick leave credits as proposed by the employer but rather to continue on sick leave without pay as ordered until such time his medical doctors (physicians), apprised of his work description, declared him fit to return to work.*** *What is telling here is this---if Blackburn's authorized sick leave without pay was to terminate upon his failure to produce a current medical certificate substantiating his lack of fitness then why wasn't Officer Blackburn informed of it in E4 instead of hearing about it from the employer at the adjudication hearing.*

(iii) Blackburn clearly understood that when he decided to return to work he must provide a ***medical certificate indicating he's fit for duty and if the employer was not convince of his fitness they had the right to challenge his medical certification*** *by securing more*

> *detailed information from his physician (***Grover vs National Research Council of Canada, *dated October 3, 2005***).* *This was in fact what the decision of June 20, 2003 stated and is not in dispute and in fact was reiterated by the employer in E4. Again, it is important to recognize and to not confuse the following two points, where in exhibit E4 the employer was asking for a medical certificate if Blackburn wished to use sick leave and not to substantiate his inability to return to work which is absent from E4. Both of these two points are very distinct and different requiring different procedures (***Grover vs National Research Council of Canada *dated October 3, 2005***) *and the latter phrase came after in subsequent.*

(12) On or about July 30, 2003, he faxed a two page letter (G18) to his local union president seeking an informal resolution with his employer over a particular ruling of Chairperson Henry while formally filing a grievance on this issue. By way of a level 2 Management Decision on Grievance, dated September 22, 2003, Blackburn was informed that 'a decision of an adjudicator was not a grievable matter pursuant to ***Section 91*** *of the PSSRA' and therefore cannot be revisited through this* Act.

(13) Next, on July 31, 2003 at 1012hrs he faxed a Parental Leave form (G11) to Millhaven's management which is dated July 30, 2003 requesting parental leave retroactively since he was denied his right to apply for it as a result of his termination in 2002. The employer's position on this matter was that they could not approve the leave until such time Blackburn was in receipt of Parental Benefits in keeping with the Employment Act *(E8). Blackburn made application on or about August 29, 2003 at the HRDC office in Windsor, Ontario through their website.*

(14) On August 4, 2003 he faxed the updated sick leave without pay form (E7) and a copy of the May 13, 2002 medical certificate/statement (E7) to Cindy Berry. It is to be noted that discussions with Berry was conducted over the telephone on more than one occasion prior to the above noted documents being faxed and the certificate was submitted to confirm several things discussed with Berry, namely, ***that he was not fit to return to work, to point out the disorder and symptoms he was suffering from has a result of stress brought about by the Employer's mistreatment of him and to provide a certificate as requested by Berry to go with the updated leave form to facilitate his pay or cash-out of his sick leave credits from either June 1, 1998 or February 11, 2002.***

(15) On August 8, 2003, Blackburn completed a Marriage Leave form (E9) requesting to be paid for five days of leave

owing retroactively in keeping with the collective agreement and his right to this particular leave since it was denied to him as a result of his suspension in 1998 and his subsequent termination in 2002. The reason put forward by the employer (E9) for not approving this leave does not make sense under the circumstance and is not supported by the collective agreement to which his grievance would have been successful but wasn't allowed to go forward. No evidence was introduced by the employer that Blackburn did not give five days notice back in 1999 by way of a Leave application and since it was now being ask for retroactively, where such request is not prohibited by the article, it should have been approved since the marriage in fact took place which was not disputed by the employer, notwithstanding that Blackburn was not able to introduce a copy of the original Marriage leave application for whatever reason. The passage of time probably impacted on why it was not produce and on why the employer did not provide any evidence or called witness who could of addressed this issue.

*(16) Blackburn received a letter dated August 14, 2003 (E8) from Cindy Berry in which she '**recognized** that the May 13, 2002 certificate sets out a medical condition which she believed was based on criminal charges. However, that the certificate did not reflect that Blackburn was unfit for duty. As such, she requested of him to submit a current physician's letter **substantiating his inability to return to work.'** Clearly, the latter wording is different and distinct from the wording in E4 and thus creates ambiguity for the grievor (**Grover v NRCC**). Despite the ambiguity Blackburn did not inform Ms. Berry of his concerns because he was of the view and rightly so that she and the Employer were already aware that he was not fit and therefore no need to substantiate that he was not fit to return to work (G1 and her tenure at Millhaven in the capacity of Acting Deputy Warden would have made her aware).*

In E4 he's being asked to provide a certificate with his sick leave indicating he's not fit to return to work and in E8, some three weeks after E4, he's being told that he now had to substantiate his inability to return to work. This is not one in the same and should not be considered as such by you. Substantiating one's inability to return to work can mean or be interpreted in different ways and in this case Blackburn took that to mean to confirm his position that he's in fact not fit to return to work for which the May 13, 2002 letter confirmed in ways that could be understood by even those who are mentally challenged.

If you are incline to find it to be one in the same, then nevertheless, the May 13, 2002 certificate covers both area and is asserted as such based on the employers own admission that the diagnosis and symptoms outlined in the

certificate would be a cause for concern if associated with an employee who's return back to work they had sought.

It is obvious to any objective, unbiased and outside observer that this certificate (May 13, 2003 certificate) is indicating or reads more to the fact that Blackburn ***is not fit to return to work*** *rather than* ***fit to return to work****, on the fact that it sets out the* ***disorder*** *and* ***symptoms****, thus dismissing any interpretation that it indicates he's fit to return to work, to which the employer recognized is being stated in E8, G1, G19, G20 and G21.*

The employer cannot have it both ways in this dispute. On one hand they claim that the certificate was submitted as evidence of Blackburn's fitness to return to work and thus subject to challenge in keeping with paragraph 320 of G1 and on the other hand recognizing that a medical condition does exist and where Marshall, in response to the question 'if an employee with said diagnosis and symptoms was brought to his attention would he return that employee to work' and he answered, "this type of diagnosis and symptoms would be a cause for concern in not bringing back an employee to work---certainly."

As well he was officially notified through this exhibit (E8) that is parental leave was not approved which led to his August 29, 2003 application under the Employment Act *to Human Resources Development Canada (HRDC). He was also informed that his adjusted sick leave without pay for an indefinite period of time was not approved because* ***it did not reflect an end date*** *and not as a result of not providing a satisfactory certificate with it.*

(17) By way of a letter (G12), dated August 14, 2003 from Wendy Smith, Compensation and Benefits Consultant, Blackburn was told the following: "In accordance with the collective agreement, we are not able to pay out in cash the hours you have to your credit for annual and sick leave. As per my previous letter dated July 17, 2003, ***a request form must be completed and approved for any paid or unpaid leave you wish to use from February 11, 2002****. Once I have received approved leave with pay forms, I can pay you for any of the days owing. Once they are approved a copy should be forwarded to this office so that* ***any pay owed can be processed****."*

In this correspondence the employer clearly failed to point out the authority that prohibits the pay out in cash of leave credits because they knew none existed and if it did exist or their was case law that prohibits it, under this circumstance the case law wouldn't apply since it was not a carry-over under normal circumstances. In any event, the statement from Compensation that the collective agreement prohibits

the paying out of earned leave credits is false. No such provision existed at the time.

*The Employer, in the past and as a matter of practice has allowed employees to cash out unused vacation credits (***Rosekat v. Treasury Board, *PSSRB, 09/05*** *) and under the circumstance should have done so in Blackburn's case as a matter of principle for his unused sick and vacation leave and nothing prevented them from doing so. To date, Blackburn has not received his reinstated sick leave credits and is still owed a portion of his reinstated vacation leave credits (leave form dated December 24, 2003) as indicated in E18.*

(18) We skip to E12 (letter from Berry to Blackburn, dated November 5, 2003) wherein she asserts that the grievor was only entitled to use his sick leave credits from the date of receipt of the decision or until declared fit to return to work, at which time Blackburn will be reinstated.

What she and the employer failed to realize is that Henry stated that I was ***entitled*** *to use my earned leave credits from the date of receipt of the decision rather than* ***must/shall*** *use it from the date of receipt of the decision. What is of more relevance is paragraph 321 of G1, which precedes 329 of G1, which states "Mr. Blackburn is entitled to the rights and privileges associated with being on sick leave without pay* ***from February 21, 2002, to the date of receipt of this decision.*** *If Mr. Blackburn has sick leave credits, he may* ***elect*** *to use these credits from the date of receipt of this decision until the date he is declared fit to turn to work." Here, the key word is elect rather than shall and since the sick leave was accrued from February 2002 (actually accrued from June 1, 1998) to June 20, 2003, Blackburn is entitled and not prohibited from seeking/requesting a cash-out from that date without any objection from the employer. No medical certificate is required in order for the employer to cash-out his sick leave credits under the circumstance of their return to him and no evidence was introduced by the employer that his request of a cash out under the circumstance of his reinstatement was prohibited or could not proceed in the manner requested.*

(19) With respect to the employer's response in this letter (E12) regarding the submission of Blackburn's certified sick leave form seeking a cash-out instead of actual leave from the workplace, that the date on this leave form should have been from 20 Jun 03 to 22 August 03 instead of 21 Feb 02 to the present (or the expiration of sick leave credits) and therefore, for that reason the leave was not approved cannot be sustained on the evidence. For one thing the sick leave credits were accrued in actuality from June 1998 to June 20, 2003 and not to February 11, 2002, which covers the period

from Blackburn's suspension without pay and his termination of employment up to his reinstatement as oppose to the assertion by the employer that they were accrued between June 20, 2003 and August 2003 and therefore they should have been used between those dates.

Clearly, if you accept the 354 hours accrued as stated on the Leave Balance sheet which is dated July 17, 2003, they could not have all accrued in the manner set out in the collective agreement in two months (June 2003 to August 2003). I reiterate and wish to make clear to you that the purpose of completing and submitting the certified sick leave form was another way to secure a cash-out of my restored sick leave credits and not to request certified sick leave (an absence or continued absence) as portrayed to you by the employer.

If it was Blackburn's intention to be absent from work on sick leave using his adjusted sick leave credits he would have informed his employer in writing and secure a medical certificate without any protesting, objection or submission of several modified sick leave forms and things would not have dragged out as they did over a six month period.

(20) With respect to the employer's response in E12 regarding annual leave, that 'two days of advance notice was not giving in keeping with Article 29.07 and therefore the leave was not approved' is asinine and not credible.

First off, the submission of the annual leave form was done for the purpose of seeking a cash-out and not an actual vacation away from work since he was already on vacation of sorts, which is why the start date is from June 1, 1998 and not from or after June 20, 2003.

This start date of June 1, 1998 is applicable because Blackburn was unfairly and without justification denied the use or cash-out of his accrued annual leave as a result of his unjustifiable suspension and or its use in the calendar year it was accrued. Further, the annual leave amount as set out in his Leave Balances and Status report (285 hours), which was generated by the Compensation Unit, was from Chairperson Henry's standpoint accrued from June 1, 1998 to February 11, 2002 and continued to accrue upon Blackburn's reinstatement from June 20, 2003 onwards. Therefore, giving advance notice is not applicable under the circumstance that necessitated this start date.

What is also noteworthy is the fact that when Blackburn used the start date after June 20, 2003 for annual leave on two separate occasions over his objection, the first one was approved, proof of which is demonstrated in E17 & G9 but the second annual leave form (E18) wasn't approved with no

explanation given and the monetary amount owing to Blackburn was not giving to him upon his termination in conjunction with G10 or separately.

(21) With respect to the notice given in E12, that being "Failure to comply or report for duty with a physician's certificate indicating that you are fit to perform your duties will be considered ***abandonment of position*** *and shall result in termination for cause" was without justification.*

It is clear by the evidence (E15 & E20) that Blackburn complied with the request and made it known to the employer the difficulty he was facing with Dr. Yee, namely is reluctance to issue a certificate of fitness or unfitness because of his lack of history with Blackburn, to which he rightly and properly requested of Warden Marshall to grant Blackburn an extension of time to secure a certificate from Dr. Teodorini, who had full knowledge of Blackburn's medical history.

Chairman Tarte, was it your suggestion that this letter (E15) did not ask the Warden to grant Blackburn an extension of time but rather stated the word 'extension' which was not specific or clear for Warden Marshall to act upon? If that is still your position today, notwithstanding Marshall's testimony that he understood Dr. Yee's letter was requesting of him to grant Blackburn an extension of time to secure the medical certificate, would be troubling to me?

(22) By way of a letter (G31), dated 13 November 2003, from Lorian Dowsett, Compensation Coordinator, she stated in the second paragraph that a 'Record of Employment ***could not*** *be completed for this period (June 1998 to present) as there were neither earnings nor hours worked.' Clearly, this is not accurate.*

The reinstatement covers this period as actual employment as if Blackburn had in fact physically worked in full employment for that period (paragraph 301 of G1). Further, the period in question was addressed by HRDC and Canada Customs and Revenue Agency (CCRA) during his application for Parental Leave, to which CCRA ruled that the period in question ***was indeed full time employment and insurable employment under Employment Insurance Legislation,*** *since he was under a* ***contract of service*** *but not limited to this only (See attached HRDC documents, namely 1) Supplementary Record of Claim, dated 28 Oct 03, setting out a request for Insurability ruling, 2) October 30, 2003 letter to Dowsett from Rob Melnyk, HRDC, 3) November 13, 2003 letter to Melnyk from Blackburn, 4) November 17, 2003 letter to Blackburn from Melnyk and 5) December 23, 2003 Insurability ruling from CCRA).*

If Mr. Jaworski needs time to review and answer/make arguments on these new submissions/documents, which is introduced solely for information purposes to put matters in proper context and to verify facts, you should grant him an adjournment which is within your jurisdiction to do so, to which I wouldn't object and is not in my opinion prejudicial to either party.

Clearly, CCRA did not focus on the restored scheduled work hours per year, as set out in G8 and given back to Blackburn when they determined that Blackburn had zero hours of insurable earnings, despite being made aware that he was wrongfully denied physically working those hours (due to suspension and termination) where remuneration would have occurred. Instead, they focused on the fact that he did not physically work those hours and did not receive remuneration and since the legislation did not take into account a situation like Blackburn's where he physically did not receive a salary from CSC, they exercised their discretion and ruled the way they did. To the contrary however, Blackburn was in fact remunerated, not in full however, his salary and wages by CSC which were deducted from his other salary earned with NRPS and this is evident by his pension, seniority and leave credits.

Secondary to this, CCRA, as suggested to them by Blackburn in the alternative, also failed to take into account the 639hrs of earned leave credits (annual and sick) which would have also qualified Blackburn for Parental Benefits since the amount required is 600hrs. The employer's stalling tactics and refusal to approve his annual and sick leave in a timely manner directly contributed to his application being denied as well. Blackburn faults CCRA in part, but more so the employer because it was incumbent upon the employer to provide to CCRA and HRDC a complete and accurate Record of Employment reflecting his interruption of earnings from June 1, 1998 to February 11, 2002. No accounting of this interruption of earnings was recorded anywhere much less on a record of employment.

When CSC Compensation was told to do so by Blackburn they refused and submitted a record of employment (G8) that did not account for the said interruption of earnings. In doing so the employer intentionally misled HRDC by providing inaccurate information which led to erroneous rulings that adversely affected Blackburn's parental leave application for benefits and eventually regular benefits.

In reviewing the attached document (Method of Determination) in Rob Melnyk's letter to Dowsett, you will observe that under the circumstance of Blackburn's suspension, termination and reinstatement, section 9.1 and section 10.1(1) can be used to support Blackburn's argument

that the reinstated yearly hours (1957 as set out in G8) are recognized as hours he actually worked (although in the latter he wasn't coming off any form of leave) which meets both requirements, namely, insured employment and remuneration.

(23) On or about December 3, 2003 Blackburn became aware through E17 that his sick leave without pay form which now included an end date as requested (August 14, 2004) was not approve and the reason given for not approving this leave was no longer based on the belief that an end date had to be recorded but rather on the basis that ***"since your annual leave was now approve your sick leave without pay for the period of February 11, 2002 to August 14, 2004 is not approved."***

What is interesting here is that at no time was Blackburn forewarned or given notice that if his annual leave was submitted and approve it would change his current status to active status, whatever that means, and at the duration of annual leave he would revert to authorized leave without pay status instead of sick leave without pay as ordered by Chairperson Henry.

What is keenly noteworthy here in E17, which the Employer refused to address and to which I did not want to raise until submissions for strategic purposes that you truly must concern yourself with is Blackburn new status or designation as of December 23, 2003 as stipulated by the Employer, of which he did not request or seek approval, whether in accordance or not with the collective agreement. Once he was told by way of this exhibit that he would be on Authorized Leave without Pay (ALWP) as of December 23, 2003, the requirement of producing a medical certificate was no longer applicable, if Blackburn was in fact or you believe he was requesting sick leave to which he wasn't.

Here, the employer failed to set out as well the particular or specific authorized leave without pay Blackburn was to be on as of December 23, 2003, in keeping with the Article that governs ALWP, which in effect would directly impact or affect how is return to work would possibly come about among other things (pay increments, duration of leave, etc). [Review the c/agreement starting from Article 30.11 for assistance]

The question you must now ask yourself is whether or not Officer Blackburn was on Authorize Leave Without Pay (ALWP) from December 23, 2003 to January 16, 2004 as stated by the employer in E17 or on Authorized Sick Leave With-Out Pay (ASLWOP) or both, especially given the absence of any evidence to the contrary or confirmation?

Upon review of E17 any objective and unbiased person would reasonable and logically conclude that Blackburn, as a result of the reference statement made by the employer, was on ALWP as of December 23, 2003 and rightly so in the absence of any claim that it was a mistake to state it and include it in E17. ***That is in fact what Blackburn concluded and he was under no obligation to clarify it for the employer if in fact it was a genuine mistake.*** *Blackburn may be wrong here but according to his reading of the collective agreement an employee cannot be off or absent from work on two different type of leave.*

With respect to the referral to Health Canada for an independent assessment on the basis that a current medical certificate was not produce to substantiate Blackburn's absence from duty is in-fact incorrect and this reason by itself is insufficient grounds for the referral **(Grover v. NRCC***) especially when Blackburn was not seeking a return to work from any form of sick leave and the employer had not requested his return to work or made it known in oral or written correspondence that they were seeking his return to work. Further, a referral of this kind is not independent as per the collective agreement* **(Marois and Hubert v. Treasury Board,** ***October 15, 2004;*** **Grover v. NRCC***).*

What is also of note is the fact that in the first paragraph of E17 ***Berry is in receipt of the things she requested*** *and* ***no notice was given advising Blackburn that failure to comply with the referral would lead to disciplinary measures including termination of employment,*** *in keeping with policy (G4) and case law.*

With respect to the letter from Berry to Davidson, dated December 3, 2003, the chronology of events leading to the referral ***all had to do with Blackburn's tenure with NRPS and his criminal charges and not with his performance with CSC and this was confirmed by Warden Marshall during cross examination.***

The evidence of Blackburn at the hearing in explaining the difference between his statement that ***he was not fit to return to work*** *as set out in his January 21, 2002 letter* ***(introduced by the employer during cross examination of Blackburn to contradict present testimony/evidence)*** *to Kelly and his letter of December 12, 2004 to Warden Marshall that he could perform the duties set out in the Performance Standards is not confusing or contradictory. Clearly, Blackburn could perform the duties as a CO1 as outlined in the Performance Standards to which he was doing during his work assignment to Millhaven Institution and continued to do without question until his departure on authorized leave without pay in May 1997.*

<u>What he refused to do was his work under stressful situation</u> which was imposed upon him by the employer through their mistreatment of him after they found out he was criminally charged and that is what he explained in his December 12, 2003 letter to Marshall.

With respect to the completion of the Consent to Release Information and Consent to Medical Assessment, Blackburn asserts that he did not consent to information being released, in part, because the phrase 'medical personnel' was too broad and not specific enough as was required of him in naming a specific doctor. Further, the form did not make clear the exact information that would be passed on to either Linda Davidson, to the Occupational Health Officer of CSC to which he did not know or CSC as a whole. Instead, it requested his consent to the exchange of relevant information between a named person and CSC rather than himself and CSC, of whom the dispute is between.

In essence, what CSC was seeking from Blackburn's perspective was 'cart-blance' or blanket approval that could have possibly led to information getting into the wrong hands or information of a more confident nature being released without his specific consent. Blackburn wished to act as the person in receipt of the assessment report and to directly provide it to the employer without the chance of it getting into the wrong hands once the employer agreed to his condition regarding his participation in the assessment.

As Blackburn testified to he did not refuse to consent to an assessment and in his opinion that was made clear to the employer by affixing his ***signature and the date of signing.*** *Even if the employer was certain of his intention to not participate, to which they could not have been in the absence of oral or written documentation stating said, it was incumbent upon them to find out for certain as to whether or not he was refusing to participate in the assessment as set out instead of guessing or presuming.*

The Consent to Medical Assessment Form was not destroyed, was not crossed out completely or crossed out in a manner that could be accurately interpreted as an outright refusal by Officer Blackburn ***If it was crossed out completely, not signed and dated and not returned then that could lead a reasonable person to assume or conclude that the employee was refusing to participate in an assessment, however this wasn't the case.***

What was done to the form was simply an ***amending****---long before becoming aware of the case of Grover* **(Grover vs NRCC***) and said amending is a practice the employer has been aware of long before they became aware of Blackburn's amending and to assume from this amending that Blackburn*

was refusing to participate was not only erroneous but premature and self-serving.

Blackburn reiterates that it was incumbent upon the employer to seek clarity as to his intention rather than assuming what it was and that is clearly what they did.

If Blackburn did not want to participate at all in the manner stipulated on the assessment form he would have said so in writing without amending the form. In amending the form Blackburn was doing so to alter formally the phraseology of it to reflect how it should be worded and read since he had no input on its formulation (this amending by the way is supported by the case of **Grover v. NRCC** *and in fact* ***it was the employer who suggested to Grover that he could amend the form to suit is liking).***

In looking at or reviewing the form Sir you must look at it in its entirety and under the circumstance or context it was amended. In doing so you will notice that Blackburn did not crossed out his name, did not crossed out the heading of the form, he took the time to add his own phrase or wording, he signed and dated the form and submitted it to the employer as requested. He did not refuse to sign, date and submit this form to the Employer, although in hindsight the employer was not the party Blackburn should have sent the form(s) to and the employer should not have held it self out as the party to receive it before the Health Assessment Advisor received it. Clearly, Blackburn's action was not and cannot be construed as indicative of an employee who was refusing to participate in the assessment but rather indicative of his willingness to participate under certain condition(s) to which he outlined to Marshall in his December 12, 2003 letter (E19). Again, if E19 was not clear enough Marshall should have informed Blackburn as such prior to terminating his employment.

Lastly, all questions and concerns Blackburn had he put to Marshall in this letter (E19) and in E20 and they were not addressed by Marshall in any follow up letter prior to his January 16, 2004 letter terminating Officer Blackburn's employment.

Blackburn, upon not hearing from Marshall concerning the issues raised in the December 12, 2003 letter wrote to him again on December 16, 2003 (part of E18) about Annual Leave and again Marshall refused to addressed this and all the other concerns. There was no excuse for doing so especially when the letters were specifically addressed to him and not Cindy Berry, whom Blackburn surmised was his "go-between since he was not made aware by Marshall that she was appointed to act in this capacity."

(24) The Termination letter (G52) from Warden Marshall to Blackburn, dated January 16, 2004, sets out two reasons that led to his and the Treasury Board decision to terminate Blackburn's employment, namely, a) "Blackburn's refusal to provide the appropriate and up to date medical information as to why you are unable to work and should be granted sick leave" and b) "Blackburn's refusal to participate in the assessment."

The evidence is clear from the employer's own correspondence(s) that they were provided with the information they requested but chose not to accept them. And rather than resolving the disputes through the grievance process as required by the collective agreement, the employer chose to label Blackburn's position, not as misconduct (Insubordination) as such behaviour was previously described but rather "unsuitable to carry out his responsibilities as a Correctional Officer," whatever that means, and then taking disciplinary action disguised under the heading Non Disciplinary Termination for Cause.

In choosing to do so this tactic severely limits the burden of proof and other obligations the employer would normally have to meet if they had proceeded via the misconduct route. No such option is available in the collective agreement or federal statute for the grievor and his Union to use to subvert justice and or manipulate the system, to which the employer has done in an attempt to justify a wrongful termination. As a result of such a backward legislation in the Financial Administration Act*, the employers' chance of winning these types of disputes (grievances) are greatly enhanced, however, I don't believe they will succeed in this case because what they were doing was illegal.*

At no time, whether in written or oral communication did Officer Blackburn inform his employer that he would not participate in the assessment and the amending of the form is not evidence of his refusal and both actions done together or subsequent under the circumstance are not grounds for termination, if indeed they occurred.

Blackburn's Review of Employer's Submissions and Arguments to the Contrary

Part 1 – The Grievance

Paragraph (para) 2: Once again the employer is being disingenuous and misleading with this assertion. A previous grievance was submitted (faxed) to Warden Marshall on December 5, 2003 on the basis that the grievor (Blackburn) had not heard back from the employer after advising the employer on November 17, 2003 about securing a medical certificate. Upon hearing from the employer by a letter dated

December 3, 2003 (E17) that particular grievance was withdrawn and the employer was aware of it, so I am at a loss as to why it would be mentioned here unless it was done to prejudice my case.

Part 11 – Rulings during the course of the Hearing

Para 5: It is an inaccurate statement when the employer asserts that the parties agreed that the facts as set out by Deputy Chairperson Henry in her Decision of June 20, 2003 (G1) were accurate. We agreed in principle that what was essentially set out in her decision was correct but disagreed on certain points she made that impacted on the grievor and employer, which gave rise to the present dispute between Blackburn and the Employer.

Para 9: The termination grievance dealt with a number of issues that gave rise to Blackburn's ultimate termination of his employment, to which the Chairman as I understood it, said he would address in his decision and or if reinstatement was granted allow the grievor extended time to re-file or pursue those grievances, to which I did not agree to on the record but reluctantly accepted for the sake of not upsetting the Chairman or delaying the hearing any further by way of application to the Federal Court. I did in fact have the consent and representation of my Union in filing my grievance. Who argues the case at a hearing is entirely a different matter and at no time did the Union withdraw its consent or representation of my grievance orally or in writing.

At the conclusion of my case I offered to enter as an exhibit the termination grievance, dated January 25, 2004, to which the Chairman intervened stating that "since it was on file with the Board you need not make it an exhibit." However, this grievance address not only my termination but the issues outlined in this paragraph, etcetera and should be addressed in the decision. They are one in the same and were filed together on one grievance and not separated at the time of its filing and the employer at that time did not object nor object when the same issues were before D/Chairwoman Henry, who in fact addressed all the issues raised in the grievance before her.

The fact that the employer chose the route of termination to avoid dealing with those issues through the grievance process should not benefit them and should not disadvantage me by considering them at a later date when the passage of time will adversely impact on the events leading up to the disputes that gave rise to my grievances.

Part 111 – The Facts (as the employer asserts it)

Para 14: The employer is misstating the facts when it states it became aware in 1998 of both the charges from Hamilton and Cobourg. The fact is CSC became aware of the charges in Hamilton only by way of a newspaper article from the Hamilton Spectator that was posted illegally at Keeper's Hall that dealt with my charges and arrest in the city of Hamilton upon my return from Jamaica. Lou Kelly then suspended me and upon receiving acknowledgement from me regarding the charges conducted a CPIC check confirming that I was indeed charged. If he had in fact become aware of the Cobourg charge prior to April 1998, he would have acted on it and he did not. In any event, this issue has been argued and adjudicated and is therefore not relevant to this proceedings.

Para 17: In my written correspondence of January 21, 2002, I made it clear to Lou Kelly what my position was and the reasons for it and up until my termination in 2004 that position hadn't changed. The employer then and now knew that I was not returning to work until the resolution of the criminal charge and until I was fit for duty. Further, it was the employer position (as noted in G1 at page 5 para 28, to which E27 was entered as E17 at the Henry hearing) "that it was necessary to keep me on leave without pay pending the resolution of the Criminal Charges." So the employer's present claim that they had no information on my fitness was not true but a lie.

Now, if you agree that they had no current medical information on my fitness from February 2002 to base a return after June 20, 2003, still does not have any legs to stand on and does not afford them the right to request one. They knew as far back as January 21, 2002 and more so when they received the medical certificate of May 13, 2002 at final level of the grievance process (Elaine Migneault of CSC Labour Relations Officer) in May 2002 confirming that I was not fit to return to work and was not going to do so until the resolution of the criminal charge, which concluded and was resolved at the Ontario Court of Appeals on April 16, 2004.

Para 19: This matter raised by the employer and argued by the parties to the satisfaction of Henry that Blackburn did not commit any wrongdoing and that his reason for reporting under the circumstance was well founded.

<u>PSSRB Decision of Deputy Chairperson Henry, dated June 20, 2003</u>

Para 21(iii): Here the employer recognized that Blackburn was entitled to have his leave credits count from June 1,

1998 to February 11, 2002 with certain exception, and this was in keeping with the present leave forms submitted to secure a cash-out of the leave credits, yet they refused to approve the leave forMs. Nowhere in the decision does it state Blackburn must provide a current medical certificate with his sick leave form in order to secure a payout or if using his adjusted sick leave with pay from June 20, 2003.

Para 21(iv) thru (x): Again they speak for themselves and are clear and unambiguous.

I would like to highlite point (vii) of para 21, that according to Henry, the medical evidence submitted at the hearing indicates that Mr. Blackburn suffers from "Adjustment Disorder (309)".

Given this disclosure, and the position of the employer (Marshall and Berry) that they did not know what this disorder was, it was incumbent upon them to find out through either their agent, Health Canada, who would have gladly told them what it means, its signs and symptoms or from Dr. Teodorini, who would have provided the above information without violating doctor-patient confidentiality.

What is noteworthy here by its absence is the fact that the employer does not recount for you paragraph 320 of Henry's decision, which is a significant paragraph. In essence it states "I order that Mr. Blackburn be ***granted*** *sick leave without pay* ***until*** *he submits to the employer a certificate from his doctor indicating that his doctor, apprised of Mr. Blackburn's work description (Exhibit E-6),* ***confirms that Mr. Blackburn is fit to return to duty".***

Clearly, a decision was rendered on June 20, 2003 dealing with my sick leave without pay ***request*** *of February 11, 2002 with certain condition to be met by me when I sought a return to work. The decision was not an opportunity for the employer to revisit the issue of my sick leave without pay request and that is in fact exactly what they have done in breech of section 91 of the PSSRA.*

<u>Post PSSRB Decision dated June 20, 2003</u>

Para 22: The employer was advised that 'if they had followed its own policies dealing with sick leave request and discipline, it would have requested that Mr. Blackburn submit a medical certificate. The employer would have informed Mr. Blackburn that his ***leave request*** *was denied until he produced the proper medical documentation.'*

Upon reviewing this aspect of the Henry decision the employer set out to revisit this issue, which was already adjudicated in violation of the PSSRA, with the intent of

terminating Blackburn's employment. Since when, if you accept that Blackburn was requesting sick leave and didn't provide medical documentation as requested by the employer, grounds for termination and what case allows it?

The employer went about revisiting this issue by first advising Officer Blackburn that they need an ***updated sick leave form to reflect his current status.*** *It was not Blackburn who requested to update his current status. At no time did the employer advised him that the current status referred to in E4 was from February 11, 2002 until the hearing, and even Ms. Berry wasn't sure whether she was referring from June 20, 2003 or from February 11, 2002. When pressed she acknowledge it was from February 11, 2002, which is of great importance since the employer claimed I couldn't use that date, notwithstanding that is exactly what the decision stated. Further, at no time did the employer advised him that a current medical certificate was to accompany the updated sick leave without pay form. Why wasn't that stated in E4 in keeping with paragraph 312 & 320 of the Henry's decision if indeed that was their intention.*

Second, the employer upon receiving the updated sick leave without pay form as requested did not file it as record keeping purposes, rather, the employer stated that an end date must be reflected and marked it not approve. This is where the employer manipulated the situation and confused matters for the Union and future adjudicator(s) by marking the form not approve as if it was submitted by Blackburn to secure an absence from work. The updated sick leave without pay form was exactly that, an updated sick leave form and as such was not submitted for the purpose of requesting sick leave without pay from February 11, 2002 as originally requested by Blackburn on that date.

Third, the issue of submitting a certificate indicating that am not fit to return to work if I choose to use my adjusted sick leave credits, mind you with no specific period of time set, was simply that. Clearly, if I was going to exercise this option then I had to submit a certificate evidencing that I was not fit to return and it's obvious that Blackburn did not choose this option.

Fourth, upon receipt of my updated sick leave without pay form and the May 13, certificate, the employer took that certificate to argue that since it did not state that I was unfit for duty they needed a current certificate to substantiate my inability to return to work (E4). The employer knew the purpose of why the May 13, 2002 certificate was submitted via telephone conversations between my self and Berry and since the purpose was not set down in writing by me, they seized upon it by claiming it did not set out my lack of

fitness. I remind you that the Employer stated it was their intention to manage my return as per Henry's decision. In E4 they alluded to this fact by stating "in the event you wish to return to work, a physician's certificate is required indicating that you are fit for duty prior to your return. Knowing this fact, what was the purpose of requesting of me to substantiate my inability to return to work by providing a medical certificate indicating I am not fit to return to work when they had already ask for such a certificate if I was to use my adjusted sick leave credits?

I reiterate that if the employer, in revisiting the issue of my original request of February 11, 2002, by attempting to follow its own policies when dealing with sick leave, a request for sick leave whether with or without pay, must first be requested by the employee. At no time over the six month period did Officer Blackburn request sick leave without pay under any policy, statute or collective agreement.

Para 32: In contrast to Blackburn's action regarding the Consent to Medical Assessment you will note here that Blackburn did not return the Disability Benefits form when he was told it was essential that he do so and when he didn't he received no discipline. The Health Canada Assessment form was completed, signed and dated, albeit after being amended, and return to the employer. Under circumstances where he didn't want to participate he did nothing and where he anticipated participating, acknowledge said and forward the required documents back to the employer.

Para 34: As I have been stating since the outset of this hearing and confirmed by Marshall and now further confirmed at this paragraph, that the employer took the position, with calculation, that I submitted the August 4, 2003 sick leave without pay form for the purpose of requesting sick leave without pay. E4 says differently and Blackburn's evidence revealed that it was submitted as requested with the belief that it was for record keeping purposes since the stated reason for its request was already known. If I had been told by the employer that if submitted it would not be used for the purpose stated but as seeking leave, and if disputed would be entered as evidence at a hearing that I was requesting sick leave without pay, I would not have submitted it.

Para 35: Once again this paragraph confirms my position that the employer, for their own calculated purposes, was using this leave application and certificate to build a new case on an old issue that I was requesting sick leave without pay and when told to substantiate my condition I refuse to which resulted in disciplinary action. This in fact was being done to subvert the sick leave provision, although article

31was not applicable and was never quoted by the employer in any of their correspondence.

If the employer's request was, as they put it, to reflect my current status and genuine in nature, then what difference would no specific end date have on an updated sick leave without pay for record keeping purposes, especially since no authority or written policy was given to Blackburn or introduced at the hearing evidencing that putting down no specific end date was prohibited?

Para 36: "A current physician's certificate to substantiate Blackburn's inability to return to work" was not necessary, was premature and not in keeping with the decision, specifically paragraph 320 of G1. The employer in reviewing G1 knew of Blackburn's status, knew Blackburn was not fit to return to work throughout the previous and current grievance process and was fully aware that the decision to return to work was left up to Blackburn until such time he wished to return to work.

Para 41: What is lost upon the employer is that they have never stated in any written correspondence, oral communication or when ask to the purpose of requiring a current certificate and it is troubling as to why their reason is absent or not stated. Clearly, if it was the employer's intention to secure my return to work on the basis of a current certificate evidencing my fitness then why didn't they included it in their written correspondence and when asked to make their position clear they refused.

I will surmise and tell you that the reason why they did not put it in writing was because it would fly, not only in the face of paragraph 320 of Henry's decision, but their position to await the resolution of the criminal charge although not publicly stated by this Management Team; my stated position since January 2002 and it would have made a case for argument that this employer (Treasury Board) don't follow decisions of adjudicators.

Para 42: It is to be noted that I never communicated with Ms. Berry through written letters until, as I recall, my letter dated October 30, 2003. It is interesting to read that Ms. Berry can claim that it was the employer's right to request a current sick leave certificate to substantiate sick leave but refuse to state the authority giving the employer that right. At the hearing she spent a lot of time talking about Article 31 as the relevant authority that gave the employer that right but when challenged she had to admit that Article 31gave that right when dealing with sick leave with pay and not sick leave without pay.

Ms. Berry's statement in E14 that she needed a current certificate to substantiate sick leave is off base/target since there was no absence on sick leave or a request for sick leave by me to substantiate. To date, I don't know the sick leave she is referring to and she has never made it clear in this letter or any letter as to which sick leave she's seeking to substantiate.

Let me make it absolutely clear to you Sir, that I was never on sick leave and there was no evidence introduced by the employer demonstrating that I was on sick leave, whether with or without pay, starting from a particular date to an end date.

I repeat I was on LWOP from May 31, 1997 to May 31, 1998. In April 1998 I was placed on Suspension With-Out Pay pending the resolution of criminal charges in the city of Hamilton up until my termination of employment, effective February 11, 2002, at which time I seized to be an employee of the Treasury Board, more specifically CSC. Now, where in this mix do you see me on sick leave, whether with or without pay where CSC is concerned?

In a separate matter the employer as stated that I was on "medical leave without pay" form July 2002 but conveniently left out that the placing of me on sick leave without pay was over the Association, my doctor and my objections and the reason(s) that led to this placement.

Ms. Berry and the employer's refusal to accept the May 13, 2002 certificate is without foundation or justification as I have alluded to earlier. As previously stated and testified to, the May 13, 2002 certificate was submitted to confirm previous medical evidence adduced before my termination in February 2002 that I was not fit to return to work with either CSC or NRPS. Now in seeking a pay out for reinstated sick leave credits the employer said I had to submit leave forms, to which I did, using the start date of February 11, 2002, since that was the date I originally requested sick leave without pay.

Para 43: When Blackburn was not providing the appropriate certificate according to the employer he was given notice in November 2003 that failure to comply would be considered "abandonment of position and shall result in termination". In January 2004 the reason for his termination was not abandonment of position but rather being unsuitable to carry out the duties of a CO1. What cause the language change when the act of not providing the required information had not changed? We are all not fools or blind Mr. Tarte as to why the language was changed to which I'm optimistic will become obvious to you as well.

Para 45: As much as the employer has the right to contest or challenge a certificate the employee has the same right even if the certificate is coming from his or her own doctor and I'm sure the employer wouldn't have it any other way.

Para 46: What is of importance here is that the employer is now claiming that the submission of the updated sick leave without pay form is tied to the production of a physician's certificate and that is why it wasn't approved. This tying together of the two was not the case in E4 and it was never submitted by me for approval in securing an absence from work.

No where in the employer's written letters did they state that upon receipt of the May 13, 2002 certificate they were in fact "challenging" it Rather, they stated that since it did not specifically state that I was or wasn't fit it was not acceptable. The first time the employer claimed they were in fact challenging it was when Berry was under cross-examination. At no time did the employer ever state that the certificate was unacceptable for the purpose of securing a pay-out but rather stated it was not acceptable because it did not state whether or not I was fit to return to work and therefore I was referred to Health Canada. I have already addressed the premature nature of the referral and the lack of foundation to make this referral.

What is of relevance here is that the request was not borne out of medically fit certificate seeking a return to work and was then challenged by the employer in keeping with the paragraph 320 and 322 of the decision.

Para 49: The conflicting wording in this form have been stroked through rather than out thus creating an amended form with wording or phrases that more reflect the position taken by me in an attempt to get the employer to commit in writing whether or not they were seeking my return to work and thus the referral in the absence of a current certificate. In contrast to the other form which is the Consent to Release of Information form, I signed and dated the Consent to Medical Assessment. Lastly, on what authority or case law is the employer relying on when they state the striking out of certain wording on this form or any form amounted to non-consent? If such an authority existed then why wasn't I informed of it by the employer as required by the duty to act fairly protocol.

Para 52: No point was made by the employer here and in January 1998, as confirmed and noted by Henry, CSC was not contributing to my stress.

Para 53: Dr. Wright, who is a trained psychiatrist, determined that I should be off work on medical grounds

*since there is not likely to be a change in my **symptomatology** until such time as the dispute is **settled.** This is evidence the employer had in their possession but claimed they didn't have it or reviewed it (evidence of Berry and Marshall). Its clear that the medical evidence indicated that I was not fit as way back as January 1998 and the employer knew that and to argue differently is not only disingenuous its disturbing to put it mildly.*

Para 54: Again the employer was aware through the February 1998 medical evidence introduced at Henry's hearing that I was to be off work until the resolution of the present problem, which was the Cobourg matter, to which CSC was not aware of and therefore not contributing any stress to the situation. The argument put forward here by the employer was the same at the Henry hearing and she did not buy it and set forth her reason for not buying.

Para 56: Dr. Shukla, a trained psychiatrist, determined in August 1999 that I should be off work on suspension with pay until the charges have been dealt with. No mention of CSC contributing to my stress is in his report and the reason for this is simple, CSC was not threatening to terminate my employment at the time of the report as noted by Chairperson Henry. Once again the employer was aware of this evidence but Marshall and Berry claimed they had not been provided with this evidence by their superiors or by the employer's lawyer, notwithstanding that they had reviewed and read the decision in its entirety that sets out the medical evidence proving that Blackburn was in deed diagnosed with an Adjustment Disorder and should be off work until the problem that created it has been resolved.

Para 60: Bullet one is not applicable in my case. Bullet two is not applicable as well. Bullet three is not applicable as well since I was not on Leave without Pay. Bullet four and five is not applicable as well.

Para 61: The employer was not accusing me of abusing my sick leave or any form of abuse of my sick leave without pay, so the introduction of this policy was not necessary and its reference here serves no purpose other than to redact what's contained in the policy.

Para 73: Mr. Dyette testimony that he was not aware of an employee being granted sick leave without pay for an indefinite period of time does nothing to assist the hearing. Is response could be based on his knowledge that no employee, prior to Blackburn, had not requested sick leave without pay for an indefinite period.

Para 74: Mr. Dyette testified 'that the employer had a right to manage and to request a medical certificate when leave is

requested or has been taken that is longer than three days.' It was his evidence when giving the collective agreement to review 'that there was no provision addressing sick leave without pay and therefore a request for a medical certificate was only applicable under Article 31, which was not applicable to Blackburn since he was not on sick leave with pay.'

Para 76: I have addressed this issue and find no need to repeat it here.

Para 79: It is hard to believe that Warden Marshall was not aware or made aware of my lack of fitness by Staff Relations, the employer's lawyer or through his reading and review of the decision.

Para 81: The employer had no problem informing you that "they had to determine if I was fit to return to work in a stressful environment and that it was a ***safety issue*** *for all concerned". I reiterate that at no time during the six month period did the employer inform me that they had to determine whether I was fit or unfit to return to work because they had safety concern issue for all involved. It was not until the hearing that I heard about the issue of safety as a concern for the employer.*

At no time did Blackburn raised the issue that is non return to Millhaven was out of concern for his safety and that of staff and inmates since he was not able to control himself as a result of his adjustment disorder.

Para 82: To the contrary, I in fact cooperated fully and provided the documentation to secure a payout of earned leave credits; provided a current medical certificate to reflect the period in question evidencing that I was not fit in order to secure a pay out of earned leave credits and returned the Health Canada form with signature and date setting out the conditions that would cause me to participate in the assessment.

Para 83: Warden Marshall and Berry had no information that I couldn't do the job. What they had at their disposal however, was five years of unblemished service record that demonstrated I could do the job to which they conveniently ignored. Arguing that they had no information, one way or the other, is not believable giving the medical evidence. When I was hired and assigned to Millhaven the employer never questioned my absence from Millhaven to determine whether or not I was fit to perform the duties of a CO1 and therefore objected to me coming there. Now, if the counterpunching argument to this was that I wasn't coming to Millhaven at the time of my hire diagnosed with an

adjustment disorder then my response would be---then why seek my return knowing I have been diagnosed as such.

Part 1V – Law and Argument

Page 85: The starting point of this case is not January 10, 2002 but rather April 1998, when the employer suspended me without pay, as they put it, when they became aware of both the Hamilton and Cobourg criminal charges (para 14 of their submissions). What is conveniently left out is the employer position and action from April 1998.

Para 87: This is a restating of the employer's position which was already addressed by Chairperson Henry to the favour of Blackburn.

Page 89: Misstates the decision by not completing what was stated in its proper context. What is lost on the employer is the fact that the issue of my sick leave without pay request has been addressed and adjudicated upon. What Mrs. Henry was doing was informing the employer of the mistakes they made rather than granting, as the employer is implying, another opportunity to revisit the same issue she has already ruled on.

The employer was not satisfied with the reinstated decision and rather than wait for Blackburn to submit a current medical certificate evidencing is fitness to return to work in keeping with the decision, they seized upon his attempt to secure a payout of his earned leave credits by first asking him to submit an updated leave form, and when he did, stated it was a request for sick leave that couldn't be approve because i) it didn't have an end date and ii) a certificate did not accompany it.

Para 91: It is also confirmed here that the employer was revisiting the same issue already adjudicated by Chairperson Henry by the statement that the employer was doing exactly as the Deputy Chairperson suggests in her decision at paragraph 313-314 in requesting of Blackburn to produce a medical certificate. What the employer left out that is contained in paragraph 313 was that the adjudicator stated that the employer ***should have*** *informed Blackburn that is* ***leave request*** *was denied until he produced the proper medical documentation. No leave request for sick leave without pay was ever requested by me as of June 20, 2003 seeking an absence from work.*

*Para 92: It is not true that the July 24, 2003 letter indicated that "****If he wishes to remain in that status, he is to submit a Leave Request Form with a physician's certificate indicating he is not fit to work."*** *What it said was* ***"If you wish to continue with sick leave (without pay or with pay,***

using the adjusted sick leave credits) the leave request form must be accompanied with a physician's certificate (attached) indicating that you are not fit to return to work." *You cannot separate the portion—using the adjusted sick leave credits from the rest of that statement. To do so would give that statement a different meaning where it would amount to asking, if you wished to continue on sick leave the leave request form must be accompanied with a physician's certificate indicating that you are not fit to return to work. This is what the employer is now implying when they assert that this was the meaning of that statement but we know differently.*

The statement that ***it gives Mr. Blackburn the option that if he wishes to return to work, that he produce a physician statement indicating that he is fit to return to work*** *is out of context, misleading and is a clever attempt to mislead or fool you. I was already aware of what my requirements were when I decided to return to work and I didn't need to hear it from my employer, who has purposely misstated the evidence of Henry on this point in order to mislead, blind or confuse you about what was actually stated by her.*

The option mentioned was referring to me ***using my adjusted sick leave credits*** *and* ***not for a return to work*** *because as you will see the physician certificate was to indicate that I was* ***not fit to return to work*** *if I chose this option.*

Para 93: Why would the employer upon receipt of the June 20, 2003 decision be interested in knowing whether I was sick/unfit or not sick/fit to return to work when the decision clearly put me on sick leave without pay, indicated that the medical evidence demonstrated I was not fit to return to work and that I stated I was not fit to return to work?

If the employer was truly interested in knowing whether I was fit or unfit to return to work, then why didn't they state that they were interested in my fitness because they wanted to bring me back to work as soon as possible or on specific return date, in keeping with past practice?

Clearly they were not interested in my return to work and this is evident by the fact that they made no offer to me to return to work either as soon as possible or on a specific date.

Para 94: ***At no time*** *did the Employer or Warden Marshall advised me that either of them wanted to ensure that I was* ***unfit and qualified to be on sick leave*** *and this issue when reviewing their correspondence to me (their letters and or Management Decision on Grievance), you will see is absent from their correspondence. In fact, when I ask Marshall*

whether he wanted to determine my fitness through the production of a medical certificate, with a view of returning me to work, he steadfastly refused to answer only to repeat through Berry that the employer had the right to ask for medical certificate to substantiate sick leave and to determine whether or not an employee was fit to return to work. I never argued to the contrary since neither was relevant to what I was seeking which was a pay out of earned leave credits and only informed him/employer that I was not on sick leave from February 11, 2002 and that I wasn't returning to work until the resolution of the criminal charge and until declared fit to return to work.

Para 95: There was no need for the employer to continue asking me to produce a physician's certificate once they had received my initial response. All they had to do after receiving my answer was to issue me a notice that failure to comply would lead to termination of employment. To argue that they were doing me a favour by giving me time and opportunity to comply is not believable. It was their strategy to drag the matter out over a six month period because for some unexplained reason six months was important to them, (to which they did not make known to me when ask), in order to rebuff any argument that Blackburn was not giving sufficient time and opportunity to comply, which was exactly the position they took at the hearing. Again, at no time did the employer, Berry or Marshall inform me that they wanted to determine my fitness through the production of a medical certificate, with a view of returning me to work as soon as possible, after the exhaustion of my sick and annual leave credits or at a specific return date.

Para 96: This is not factually correct. At no time did the employer, whether through oral or written letters, inform me that they were giving me five to six months to produce a certificate indicating either I was fit or unfit to return to work or unfit and should remain on sick leave with or without pay.

In stating that Dr. Yee referred me back to my previous family physician, Dr. Teodorini, is misstating the evidence and distorting the context of his letter addressed to Warden Marshall. Dr. Yee, by way of E4 sets out his reasons for not giving me a certificate and asked Marshall to extend the deadline in order for me to secure a certificate from Dr. Teodorini, who had the full history on my medical situation.

It is incorrect when the employer states that 'Dr. Yee was unable to indicate (for whatever reason) that Mr. Blackburn was either fit or unfit to work". Dr. Yee clearly stated why he could not give me a certificate. As such, it is troubling to learn, that not even Dr. Yee who has no axe to grind against

the employer is not immune from the venom being expelled by the employer.

Para 98: The reason for the referral was not because the employer was acting in good faith in attempting to determine my fitness. It was because I attempted in good faith to secure a certificate, albeit under protest, from Dr. Yee and he refused to do so for reasons that were sincere and thus reverse the onus back on the employer, specifically, Warden Marshall, who was the head of Millhaven Institution to grant an extension of time so that I could eventually secure a certificate.

As you can see and read for your self the employer over the six month period uses or hops between different language regarding the issue of my fitness, in that on one hand they want a certificate indicating whether am fit or not and on the other hand asking me to substantiate my absence from duty, both of which are uniquely distinct and different from one another.

Now, there was no basis or legal authority for me to substantiate my absence because the employer already knew why I was absent. As such, Berry and Marshall should have been aware or made aware and the employer was the direct cause of my absence through their termination of my employment on February 11, 2002.

We now know from the hearing before you that the period of absence the Employer, Berry and Marshall was referring to was from February 11, 2002 to June 20, 2003 and not from June 20, 2003.

If you believe the employer when they state 'they needed me to substantiate my absence from duty (the period refer to above) by way of a medical certificate', you would have had to conclude that I was on sick leave from February 11, 2002, in the absence of documentary evidence.

I reiterate that I never was on sick leave where CSC is concerned for the period noted and there was no evidence introduced by the employer that I was on sick leave for that period.

Para 99: I never refused to participate in the Health Canada Assessment per se. What I refused to do was to participate in the precise language set out on the form and in fact I advised the Marshall and the employer that I would participate or consider participating if in fact it was their sincere intention to return to me work to which they refused to do. The employer is being disingenuous and is attempting to mislead you by not restating the full statement in its proper context when claiming that I adamantly refused to consent to the

assessment, when in fact I said I would under certain conditions to which the employer did not address but terminated my employment instead.

Para 100: It doesn't surprise me that the Employer, when they believe a particular statement will aid their side, does not restate the entire statement or paragraph for you to fully understand the context and meaning of the statement or paragraph. In reading the entire letter (G24), paying particular attention to page 3 of 4, second paragraph in, you will get the full understanding of it like the previous adjudicator. However, to ensure that you do understand it I remind you that on February 11, 2002, I was ***requesting*** *sick leave without pay (G2—a copy of the original Leave Request Form, dated February 11, 2002) unlike the present case before you, and since I was not informed by Warden Kelly as to whether the request was not approve for this reason no issue arose, other than my termination of employment, that would have generated a grievance from me regarding whether in fact I was under authority to satisfy the employer of my condition since I was requesting sick leave without pay rather than sick leave with pay.*

Now, in citing G24, the employer failed to highlite for you the following: paragraph 1 of page 2 where I made it clear to Warden Kelly and the employer in January 2002 that I was not fit to return to the Institution because of the ongoing stress you have subjected me to. Second, paragraph 4 of page 2 in which Warden Kelly and the employer themselves acknowledge that they have been advised that I was not going to return to work until the criminal charges have been fully dealt with and I am fit to return to work.

Para 103: Before I address the main argument I would like to point out here that the employer, once again demonstrates to you that they were aware that Blackburn was and have always maintained that he wasn't fit to return to work with CSC.

Now, what Blackburn indicated or advised at the hearing before Madame Henry was the same as what he told Warden Kelly and the employer in January 2002, and that was "Finally, given the ongoing stress the suspension from work has brought on, the ongoing fact finding into my behaviour and the mistreatment the Services and yourself has brought to bear upon me, has finally worn me out mentally and emotionally. Given my present mental and emotional state where CSC is concerned, at this time I am in no way fit to perform my duties as a CX-01 in a penal institution." When the suspension became a termination in February 2002 I was informed by my Union President, Sylvain Martel, to secure a medical certificate indicating I

was not fit to return to work and reiterating that I suffer from an Adjustment Disorder to which I did.

There is no contrast and the language used above was clear and precise. My letter to Davidson, which was in confidence to which I didn't have to disclose at this hearing but did as a matter of revealing the entire picture and not out of fear, was simply to let her know that CSC had no justifiable basis to refer me to Health Canada. That the assertion of Ms. Berry needing to know if I could do the job as set out in the performance standards was bogus and that I can do the job as described but the ongoing stress brought to bear upon me by CSC was impacting on me mentally and emotionally to return to do the job. I have been consistent throughout and from the outset beginning in January 2002 and Ms. Davidson was never held out to be the Employer or Warden of Millhaven Institution.

The statement by the employer that "he has gone so far as to file the medical reports relating to the NRPS job/dispute" is misleading and factually incorrect. These medical reports including the May 13, 2002 certificate were used to demonstrate to Madame Henry that I suffer from an Adjustment Disorder to which medical experts determined that said diagnosis is grounds to keep me from returning to work.

Para 104: To the contrary, the medical documentation is specific, on point and was authored after constant monitoring of me. So to categorize or label them as sparse is without merit. Since CSC is of the view that they are sparse what would they suggest should occur in the future?

As a matter of information, in August 1999 I was suspended without pay from NRPS after being sentenced and as a direct result of this suspension I returned to Windsor in September 1999. In February 2001 I returned to NRPS in the city of St. Catharines and was assigned to desk duty in the Alternate Response Unit after being successful on appeal. Therefore, in fairness and with all due respect to the employer, the term sparse probably surfaced due to their lack of knowledge or powers of deduction.

Para 105: I clearly knew whether or not if I was fit or unfit to return to work and I stated that I was unfit to return to work to then Warden, Lou Kelly, at the hearing before Madame Henry and to A/Deputy Warden Berry and Warden Marshall. At no time did I adopt a position that suited a particular position and then adopted a different position contrary to one previously taken throughout my dealings with Corrections Canada.

Para 106: It is imperative when citing a particular case law to support your position that the reference case is the same or uniquely similar to the present case being argued. In the case of the United Auto Workers being referred to here by the employer is not all similar to the present case being argued. In that case the Grievor was i) absent from work as ordered by his doctor as a result of straining his side and not as a result of termination, ii) the grievor had return to work and in the case before you the grievor did not return or ask to return to work, iii) the grievor informed his employer that the reason for taking the day off was due to his doctor advising him to do so, iv) the grievor, at the time of his absence, was employed by the employer and in the case before you the grievor was not an employee of or employed by the employer.

Para 107: The employer cannot have it both ways. In February 2002, when told that I was requesting sick leave without pay due to stress the employer ignored this fact and did not make any effort to learn of the cause. Instead, they fired me.

Upon my reinstatement and being informed of the causes, diagnosis, signs and symptoms that led to my original request in February 2002, which led to the ordering of me on sick leave without pay, the employer asserted that they were still unsure as to whether I was fit or not. This is unbelievable and cannot be accepted as genuine and it definitely does not afford the employer reasonable grounds upon which to exercise its right to require a medical certificate from me because the issue of my mental or physical condition was not the basis or reason cited for my termination in 2002 and in 2003 I was not requesting sick leave or returning to work after an absence on sick leave. I take no issue with the employer, as I have stated before or testified to, with respect to its right to request a medical certificate from its employees but that right is limited to certain conditions to which I have already outlined and to which you are keenly aware of thus no need to repeat them here.

The employer can from out of the blue request of me to provide a medical certificate just as much as I can out of the blue request of them to grant me Parental Leave but I do not have to adhere or follow it and neither do they, however, if the request are legitimate they should genuinely be acted upon if they are truly related to a particular issue.

Para 108: This is misstating the evidence. At no time did I ever acknowledge that the employer had a right to not act on any request made to it by its employees. What I acknowledge was that the employer did have a right to request a medical certificate from an employee who is requesting sick leave but only when certain conditions are in existence. The latter

statement is inaccurate. Deputy Chairperson Henry did not inform the employer that they should now request of Officer Blackburn to obtain and produce a medical certificate. What she clearly stated was that 'if the employer had followed its own policy dealing with sick leave upon becoming aware of the request for sick leave without pay they should have requested from him a medical certificate confirming his condition and since they had not dealt with the leave fairly, ordered him on sick leave without pay until he submits to his employer a certificate confirming he's fit for duty' (paragraph 320 of G1).

Para 109: The May 13, 2002 certificate cannot be described as being old in the sense that it is outdated, which is what is being implied by the employer, for the following reasons: the period in question for the employer is from February 11, 2002, which precedes May 13, 2002, with respect to my absence and second, the passage of time is a natural process in dispute resolution impacting on when a decision is reached.

The fact that the grievance was not adjudicated until June 20, 2003 is not my fault and the length of time it took to adjudicate was never held or noted against me by Madame Henry, which is what the employer was doing and wants you to do.

Para 110: Once again, when the employer believe a case helps their cause, notwithstanding they argue their case to the contrary, they still cite it with the hope that you won't know or recall differently. Remember that the employer (Marshall) steadfastly refused to admit that they fired me for <u>incapacity</u> but rather for not being a suitable employee due to my refusal to cooperate, notwithstanding that G4 at page 31 part V11, covers Non-Disciplinary Demotion or Termination for Cause under two headings, namely 1) Incompetence and 2) Incapacity, where termination of employment for personal suitability is included under this heading. It then goes on to talk about Guidance which list seven points that must be adhered to or followed when demoting or terminating the employment of an employee for cause other than for misconduct and breach of discipline except in exceptional cases, which was not adhered to by the employer.

My year of absence was authorized by then Warden, Lou Kelly, and the years that follow that resulted in my absence was as a result of a suspension imposed by Warden Kelly, and my absence from February 11, 2002, was due in part, to my employment being terminated by Warden Kelly and cannot be totally attributed to my request for sick leave without pay. This is nothing like the case of Begley referred to here.

Para 111: Unlike Begley, I was not on sick leave for illness at any time with CSC prior to my reinstatement of June 20, 2003. I was not an employee of CSC and therefore was under no obligation to inform or update the employer of my condition, whatever it was.

With respect to accommodation, the employer was informed that I was to be on sick leave without pay until I submit a certificate confirming my fitness to return, and they failed to accommodate me in this fashion when they had a duty to do so (Begley and page 31 & 32 of G1).

Para 112: At no time did the medical evidence (G19, G20, G21 & E7) that I introduced stated or implied that I would not be able to report to work in the near future as if I was never going to return. To the contrary, the medical evidence I introduced clearly stated that my Adjustment Disorder would be resolved following the resolution of the criminal charges against me. Further, I in fact made it clear to the employer that I would return once the criminal charge(s) were resolved and I was declared fit to return to work.

Para 113: I was not the cause that prevented the employer from determining my fitness. It was their own personnel at Staff Relations, their legal counsel and their own refusal to inform me as to why they needed to determine my fitness, especially in the face of the medical evidence in their possession, to which they referred to and introduced as evidence (E28—January 21, 2002 letter from me to Kelly).

Para 115: As stated by Deputy Chairman Tarte in that case "the employer's decision is determined at the time of the termination on the basis of what it knew or should have known at that time". The employer, excluding Berry and Marshall, knew from January 2002 that I was not fit to return to work. When Marshall became the Warden of Millhaven Institution in February 18, 2002 (E25), three days before Kelly's termination letter of February 21, 2002 (para 49 of G1) he would have been made aware of my firing and kept up to speed, notwithstanding the argument that Kelly had carriage of the case. Further, the termination actually took place under Marshall's watch since Kelly's letter is dated February 21, 2002, notwithstanding my termination of employment was effective as of February 11, 2002. It is logical and reasonable to infer that Marshall knew of or was continuously briefed on my termination grievance and how it was proceeding, since he was now the head of the institution, notwithstanding the assertion that Kelly, who was no longer the Warden and thus would have no jurisdiction over Blackburn in that capacity, had carriage of Blackburn's case.

As Marshall stated at the hearing he was continuously briefed by Berry, Staff Relations and legal counsel after the

decision so why would it be not reasonable to infer that he was also brief upon becoming Warden at Millhaven.

If you are incline to give him the benefit of the doubt that he was not aware of my lack of fitness prior to June 20, 2003, that is your prerogative, however, upon receipt of the decision that basically put me back on strength under his jurisdiction, he cannot be given the benefit of the doubt that he still wasn't aware or made aware of my lack of fitness or medical condition. He would have had to been blind and deaf to not know and we both know he's neither blind and/or deaf.

Para 116: The employer, at no time throughout attempted to accommodate me by either allowing me to return to work in a less stressful environment (perimeter duty or tower) or allow me to continue on sick leave without pay as ordered until I submit a certificate confirming that I am fit to return to work.

Para 117: At no time did I attempted to thwart or thwarted the efforts of the employer at every turn or any turn during this dispute. Once I was informed over the telephone by Berry that any leave form submitted for a payout must be accompanied by a certificate I provide the May 13, 2002 medical certificate under protest indicating that I was not fit to return until the resolution of the criminal charge for the period in question (February 11, 2002 to Indefinite) only in an attempt to secure a pay out of sick leave credits. When I was told I needed a certificate after I had spoken with Compensation earlier, who had informed me that all I needed to do was submit leave forms not accompanied by any certificate (confirmed by G12 and later by E24), I did as I was told in good faith to secure the pay out.

Para 118: My situation is not even comparable to Funnell. There was no evidence introduced by the employer demonstrating that I was incapable of performing the duties of the position and that I wouldn't be able to do so in the foreseeable future. Mere guessing is an insufficient and is an unreasonable excuse for a reason. The employer was not left to guess if I was capable of performing my duties because they already knew I could from my previous tenure and nothing subsequent of a clinical or forensic nature impacted on my capabilities, as it was with Funnell.

Para 119: McCormick was on sick leave and I was not and there was no issue raised that I would not be returning to work in the foreseeable future. Therefore, nothing more needs to be said.

Para 121: It was not the employer position that they were concerned over whether I would be capable of regular attendance in the foreseeable future.

Para 123: The employer did not exhaust all means available to determine if I was indeed fit or unfit to return to work. When I attempted to get a certificate and was not able to do so, and upon being notified that my relationship with Dr.Teodorini was severed, the employer never accommodated me by allowing me to secure a certificate from another doctor or psychiatrist. Instead, they referred me to Health Canada for an assessment that amounted to a clinical or forensic assessment without foundation or justification.

The medical evidence stated I was unfit to return to work and when CSC intervened they were informed that I was unfit through the medical evidence and confirmed in the May 13, 2002 certificate.

I needed no certificate to continue on sick leave without pay and that is why Madame Henry did not order that my sick leave without pay as of June 20, 2003 was contingent upon me providing a certificate.

Para 124: At no time did the employer ever communicated to me that since the termination grievance was ongoing and we've been made aware in October 2002 that you would be reinstated, please continue to follow up with your doctor so that we can determine your fitness when reinstatement becomes official. If I was under any obligation or authority to do so I would have notwithstanding I was not an employee of theirs. Placing the onus on me to indicate in the interim (February 2002 to June 2003) once I was terminated does not make sense under the circumstance.

Para 125: This is where the employer's case falls apart as I have already stated. As you can see it is there position that I requested sick leave in August of 2003 and that is factually incorrect. I never requested leave in August 2003 or any period after that.

I can rightly infer now that the leave application being referred to was the August 4, 2003 one (E7). How in the world can this leave application be held up in August 2003 to be requesting sick leave for a time already passed. It can only be held up on two fronts, that is a) if sick leave was actually taken in February 2002 and therefore presently submitted to confirm that in fact it was by way of a paper trail or b) submitted as requested to update the employer's file. ***What we do know Blackburn never was on sick leave as of February 2002.***

The employer here has stated that they assumed that I may be ill. Did they arrive at this assumption after reviewing the medical evidence? Given this assumption, then why would the employer need to confirm or substantiate it when I was not requesting a return and they were not asking me to return?

Para 126: As previously stated all sick leave application and absence form was submitted in various forms to secure a payout because each one that was submitted for that purpose was not approved for various reasons and they were not submitted to secure an absence from work since I was already absent from work.

Para 127: Raised by the Employer and addressed at the hearing by Madame Henry and the certificate covered the period of December 1997 to May 2002 as stated by her at para 159 of G1. I refer you para 171, 172 & 173 of G1 as well.

Para 128: The May 13, 2002 certificate cannot be discounted as of June 20, 2003. It is along with the other medical evidence that helped convince Madame Henry that I was in fact not fit to return to work with CSC as I stated in my January 21, 2002 letter to Warden Kelly, and thus part of the reason why she placed me on sick leave without pay. This certificate is relevant to substantiate my inability to return to work and that is what I told the employer because my absence was ongoing, situational and predicated on my criminal charges being resolved to which the employer recognized and was following. The two are intricately linked and cannot be separated.

Para 130: Ricafort v. TBS is not applicable to this case since the grievance dealt with getting sick leave used back.

Para 134: Trepanier v. TBS is not applicable to this case because I never fell ill following a grievance hearing.

Para 137: No leave was submitted requesting sick leave without pay that required being approved to secure an absent from work so anything that flowed from that leave being denied did not apply to me since from my perspective no such leave existed.

Para 142: An employee returning to work after a period of absence and the employer request a certificate before approving the leave and the employee failed to provide it, the practice was to not approve the leave rather than terminating the employee's employment. For termination to be upheld the employee must be on sick leave when a request for a certificate is made and is not complied with or while on some other form of leave has done something where his or

her mental stability is of concern to the employer that would adversely affect the safety of staff, the employee himself or others. Neither was the case here.

Para 143: Not applicable to this case because I did not suffer from chronic mental illness.

Para 144: The employer did not inform me that they had serious reasons to believe that my physical and or mental condition would adversely impact on the performance of my duties or that I had a condition that may affect my health and security of others and did not introduced any evidence at the hearing to support such a claim.

As the health Canada protocols states, an employee must voluntarily participate for the process to work and no where in its protocol does it state that refusing to participate is at his or her own peril.

Para 147: As stated before the employer was not left in a position to hazard a guess as to whether or not I was fit to return to work. They were told on an ongoing basis since January 2002 and during the grievance process. At no time through the grievance process with Henry did I ever request a return to work because I was fit. I have been clear and consistent throughout that I was not fit to return to work until the resolution of the criminal charge and am declared fit to return to work.

Summary

This summary is not to be construed as the chronological order of events.

The updated August 4, 2003 Leave Application and Absent Report was submitted per the Employer's request to reflect my current status after they were in receipt of the June 20, 2003 decision ordering me on sick leave without pay as of June 20, 2003.

This particular leave application and absent report was submitted by Blackburn on the belief that the Employer needed it as requested and not on the belief that the Employer needed it to approve or not approve his current sick leave without pay status.

Blackburn was never advised or inform prior to submitting this leave application that the Employer required it in order to approve his current sick leave without pay status.

Since the Employer had not dealt fairly with Blackburn's original sick leave without pay application requesting an absence from work in February 2002, which led in part to

the filing of his termination grievance in 2002, the Adjudicator, Madame Henry, ordered me off on sick leave without pay until such time I produce a medical certificate confirming that am fit to return to work.

At no time was this leave application submitted to seek approval for a continuance on sick leave with or without pay.

Upon being notified that the leave application was not accepted because it did not reflect an "end date" he submitted another leave application that set out an end date of August 2004.

When he was informed by the Employer that his leave application which was submitted to secure a cash-out was not approve because a current certificate was not attached and that the May 13, 2002 certificate was not satisfactory, he informed the Employer that indeed it was current for the purpose of securing a cash-out.

When he was informed by the employer that his leave application was not approved because the May 13, 2002 certificate did not state whether he was fit or not to return to work, he informed the employer of his objections, filed a grievance and submitted other sick leave application (with or without pay, certified and uncertified) on his own and by way of suggestion by the employer, which were not approved as well for the same reason note above.

When he was informed that his leave application would not be approve because the employer needed him to substantiate his inability to return to work and needed a current certificate of fitness he informed the employer of his objection and filed a grievance.

When he was given notice by the employer in early November 2003, some five months after the decision and when the dispute arose, that failure to submit a current certificate evidencing fit or unfit by a deadline date it would be considered abandoning of position that would result in termination of employment, he endeavoured to do so over his objections, informed the employer of his objections and filed a grievance.

When he was not able to secure a certificate at the deadline he secured a letter from Dr. Yee, wherein Dr. Yee advised the employer as to the reasons why he couldn't give one to Blackburn and requested of Warden Marshall to grant Blackburn an extension to secure one from his doctor (Dr. Teodorini) in St. Catharines, who had care, knowledge and carriage of Blackburn complete medical history.

The employer, upon receiving Dr. Yee's letter by the deadline outlined (November 17, 2003) and upon receiving the letter addressed to Dr. Teodorini from me regarding his severing of our doctor/patient relationship, the employer chose not to accommodate me as outlined in Yee's letter but rather to refer me to Health Canada for a clinical and or forensic medical assessment without any medical evidence that raised questions about my mental and physical ability to do the job of a Correctional Officer 1 that came into their possession covering the period from February 11, 2002 to June 20, 2003.

In reviewing the employer's own evidence you will see that I never form the outset (June 20, 2003) requested to be absent from work through the submission of a leave application. What you will see is that I requested Parental Leave and that is transparently clear and void of ambiguity.

My leave application for a payout or cash-out, whichever term is preferable to you, was not initially approve, to which I now believe was to assist the Appeal Board of CCRA, in coming to a decision that would conclude that I had no insurable hours or was remunerated as required under the Employment Act *to secure Parental Leave benefits.*

Once this decision was reached by CCRA the employer then, as a matter of camouflaging their underhanded strategy, cited the reason for now approving and only a portion of my annual leave credits was because I had now giving them advance notice.

Upon being informed that I still had a number of annual leave credits I resubmitted another annual leave application to secure a cash-out with written explanation but the employer did not approve it and to date no answer as been provided to me.

At no time prior to terminating my employment was I giving notice that my employment would be terminated for not providing a current medical certificate and refusing to participate in an assessment with Health Canada. This is clearly in violation of their own policy that is set out in G4 — Guide to Staff Discipline and case law concerning the duty to act fairly and to give actual notice so that the employee, if he so chooses, to give evidence to mitigate.

<u>Remedy</u>

The Grievor respectfully request that the grievance be allowed. In the event that you elect to dismiss the grievance, you compensate him for outstanding earned sick and vacation leave credits earned from June 20, 2003 to January

16, 2004 and monetary compensation that goes with being terminated.

1) I specifically seek full reinstatement to the position I held on January 16, 2004 prior to being informed about my termination of employment and to be returned to full time work/employment as a Correctional Officer 1 after sixty (60) days have elapsed after your decision in order to secure living accommodations in the Greater Kingston area.

2) I seek full compensation of my salary and wages from January 16, 2004 to the date of the decision without any penalty or deduction of my salary for Union dues.

3) I seek an immediate expunging of my Personnel and Employment file regarding this case.

4) I seek full reinstatement of my seniority, pension and pay increments in keeping with the collective agreement and legislation and that my pension plan be updated and/or supplemented within six months in accordance with the Income Tax Act *and other applicable Federal statutes.*

5) I seek full reinstatement of my sick and vacation leave credits in the form of an immediate cash-out effective the date of the decision and to be in receipt of it no more than 14 days after your decision.

6) I seek a return to the reception unit at Millhaven Institution to which I was assigned to at the time of my authorized leave without pay in May 1997.

7) I seek appropriate damages for mental anguish and humiliation.

8) I seek reimbursement of monetary expenses (meals, housing accommodation and gas allowance = $1,500.00) in going forward with my adjudication hearing.

I request that you remain seized of this hearing for 90 days or until such time the remedies are satisfied to intervene if necessary and enforce any dispute that may arise over the interpretation of your decision.

List of Authorities

1. Chander P. Grover v. National Research Councill of Canada, *dated October 3, 2005*

2. Jean Pelletier v. Attorney General of Canada, *dated November 18, 2005*

3. William Burrow v. CCRA, *dated September 7, 2005*

4. M. Marois and A. Hubert v. Treasury Board, *dated 2004*

5. Sharon Rose Taylor v. Treasury Board, *dated 2004*

6. S. Dubois v. Treasury Board, *dated 2004*

7. G.A. Loyer v. Treasury Board, *dated 2004*

8. Rosekat v. Treasury Board, *dated September 28, 2005*

9. A. Maan v. Treasury Board, *dated November 6, 2003*

10. S. Boucher et al. v. Treasury Board, *dated 2004*

11. H.A. Higgs v. Treasury Board, *dated April 27, 2004*

12. Greg Jones v. Treasury Board, *dated June 3, 2005*

13. Robert Burton v. Treasury Board, *dated June 6, 2004*

14. William D. Constantini v. Treasury Board, *September 3, 2004*

15. Dave Dhaliwal v. Treasury Board, *dated August 6, 2004*

16. Gilles Alain Loyer v. Treasury Board, *March 1, 2004*

17. Solange Boucher et al v. treasury Board, *dated March 30, 2004*

This specific list of authorities are submitted for the issues raised and addressed by the Adjudicators which are parallel and similar to issues and argument raised by me, the Grievor, and which rebuts the argument of the Employer.

They cover progressive discipline, cash out of annual leave, sick leave, whether Health Canada is independent, duty to act fairly and actual notice, dealing with the issue of voluntary, adjustment disorder, rehabilitative potential, penalty for refusing to follow employer's instructions, etcetera

[*Sic* throughout]

[Emphasis in the original]

[75] The reply on behalf of the employer is as follows:

1. *The Employer repeats and relies on the facts, allegations, and arguments put forth in its written submissions dated November 15, 2005.*

2. *Exhibit E-4, the first correspondence between the Employer and the Grievor from ADW Cindy Berry on July 24, 2003 is quite clear. Ms Berry states at paragraph 4 of that correspondence as follows:*

    1. *currently, you are on authorized sick leave without pay;*

    2. *it is essential that an updated leave request form (attached) be submitted to Milhaven Institution reflecting your current status;*

    3. *if you wish to continue with sick leave (**without pay** or **with pay**) using the adjusted sick leave credits, a leave request form must be accompanied with a Physician's Certificate (attached) indicating that you are not fit to return to work;*

    4. *in the event that you wish to return to work, a Physician's Certificate is required indicating that you are fit for duty prior to your return;*

    5. *please submit your updated leave request form and Physician's Certificate to me by 11 August 2003.*

Exhibit E-4, letter dated July 24, 2003 from C. Berry to M. Blackburn;

Evidence of C. Berry, December 14, 2004;

Evidence of C. Berry, June 6-7, 2005.

3. *There is no confusion or mystery as to the events that took place. Adjudicator Henry's decision reinstated Mr. Blackburn into his position, making certain findings for the period between June 1, 1998 and February 11, 2002. Mr. Blackburn was reinstated into his previous position as a CX-1, however, did not receive any salary given the monies he was earning in his full time position as a Police Constable with the NRPS. Pursuant to Madame Henry's decision, Mr. Blackburn did receive pension, leave credits, and seniority for the period of June 1, 1998 to February 11, 2002. These were limited as stated by Madame Henry in her decision at paragraphs 300 and 301.*

Exhibit G-1, PSSRB Decision No 166-2-20944, paras 299-301.

4. *As Mr. Blackburn was to return to work on February 11, 2002; did report to the Institution; did request sick leave; and completed a sick leave application form, the Adjudicator dealt with the period of time from February*

11, 2002 forward, separate from the June 1, 1998 to February 11, 2002 period. The Grievor was looking to be allowed to not return to work and be on sick leave without pay.

Exhibit G-1, PSSRB Decision No 166-2-20944, at paras 303-306;

Exhibit G-2, Leave Application Form dated 11-02-02.

5. *Mr. Blackburn was discharged from his position on February 21, 2002, effective February 11, 2002, which discharge was the subject matter of the adjudication decision of June 20, 2003.*

Exhibit G-1, PSSRB Decision No 166-2-20944, at para. 303-306.

6. *In essence, the Board placed Mr. Blackburn in the position he would have been, had he not been discharged, stating that the Employer* ***should have dealt with his request for sick leave fairly****. Given that decision was June of 2003, (some eighteen months after the termination) it reinstated Mr. Blackburn into his position, however, given his sick leave had not been dealt with by the Employer, the period from February 11, 2002 to the date of the decision, Mr. Blackburn's status had to be addressed. The Board did this by placing Mr. Blackburn sick leave without pay. This is what he had requested and what the Employer had not dealt with.*

Exhibit G-1, PSSRB Decision No 166-2-20944, at paras 320, 321, 329.

7. *As of June 20, 2003, Mr. Blackburn is an employee of the CSC and his status is sick leave without pay as stated by Ms Berry in her letter of July 24, 2003 (Exhibit E-4). His status can be nothing else given the order of the Board. There is an obvious gap in time between the time that the decision as rendered and it is received by the parties. It is only logical that the Employer accept that Mr. Blackburn's situation remains as it would be during this gap in time to allow for both parties to receive and review the decision. This is exactly how the Employer treated Mr. Blackburn, leaving him on sick leave without pay and moving forward from that point.*

Exhibit G-1, PSSRB Decision No 166-2-20944, at paras 320, 321, 329.

8. *Mr. Blackburn, as an employee, can find himself in the following situations:*

1. *on active duty;*

2. *on authorized leave with pay;*

3. *on authorized leave without pay;*

4. *on unauthorized leave.*

If Mr. Blackburn was on unauthorized leave, this may lead to disciplinary sanctions. The Employer did not consider Mr. Blackburn to be on unauthorized leave, the Employer considered Mr. Blackburn to be on authorized leave without pay. No discipline was considered with respect to Mr. Blackburn.

9. *The Collective Agreement references a number of different forms of leave, including sick leave with pay. The Collective Agreement also sets out various others. Mr. Blackburn, to be away from work, must fall within one of the leave types or he would be on an unauthorized leave. Sick leave without pay is not dealt with in the Collective Agreement, however, can be a form of leave without pay.*

10. *The Leave Without Pay Policy was filed as Exhibit E-21 and covers illness or injury. Appendix "A" of the Leave Without Pay Policy sets out standards for leave without pay situations, and include when employees are unable to work due to illness or injury and have exhausted their sick leave credits or injury on duty leave. The Policy states that:*

> *where it is clear that the employee will not be able to return to duty within the foreseeable future, managers must consider granting such leave without pay, for a period sufficient to enable the employee to make necessary personal adjustments and preparations from the Public Service on medical grounds.*

The section goes on to state that:

> *where Management is satisfied that there is a good chance that the employee will be able to return to work within a reasonable period of time (the length of which may vary according to the circumstances of the case), leave without pay provides an option to bridge the employment gap. Management must* ***regularly reexamine all cases to ensure that continuation of leave without pay is warranted by current medical evidence****.*

The Policy goes on to state that:

> *Management must resolve such leave without pay situations within two years of the leave's commencement, although they can, in some circumstances, be extended to accommodate exceptional cases.*

The Policy goes on to state that:

> *the period of leave without pay must be flexible enough to allow managers to accommodate the needs of employees with special recovery problems including their retraining.*

Exhibit E-21, Leave Without Pay Policy, Appendix "A".

11. *Satisfactory medical evidence, in the eyes of the Employer, was a Physician's Certificate. The Employer was clearly prepared to accept a Physician's Certificate of Mr. Blackburn's personal physician and this is clearly indicated in the correspondence sent to Mr. Blackburn.*

Exhibit E-4, Letter dated July 24, 2003 from C Berry to M Blackburn;

Exhibit E-8, Letter dated August 14, 2003 from C Berry to M Blackburn;

Exhibit E-9, Letter dated August 22, 2003 from C Berry to M Blackburn;

Exhibit E-12, Letter dated November 5, 2003;

Exhibit E-14, Letter of November 7, 2003 from C Berry to M Blackburn;

Evidence of C Berry, December 14, 2004;

Evidence of C Berry, June 6-7, 2005;

Evidence of J Marshall, October 3-4, 2005.

12. *In addition, Article 6 of the Correctional Officer's Collective Agreement reserves the authority of those charged with responsibilities in the Public Service.*

TBS UCCO SACC CSN Collective Agreement, Article 6.

13. *With respect to paragraph 6 of Mr. Blackburn's submissions (found on pages 2 and 3) Mr. Blackburn speaks of issues of safety being raised with Mr. Blackburn. Mr. Blackburn's position is that of a Correctional Officer*

in Milhaven Maximum Security Institution. Mr. Marshall, the Warden of the Institution, gave an overview of the Institution. Milhaven is a 500 bed maximum capacity facility with 430 full-time staff and 20 to 25 contractors. In addition, it was/is the Regional Reception Assessment Centre ("RRAC") for all federally sentenced inmates from Ontario, with approximately 1200 inmates going in and out through that program per year. It is the largest maximum security penitentiary in the country which includes a mental health unit and a segregation unit. It is trite to say that the safety of the Grievor, of inmates, and of other staff is a real and ongoing concern when the Grievor (or any other employee) is taking the position that he should be on sick leave. Knowing exactly what ails a particular employee, be it a broken leg or a mental illness, has a direct potential bearing on the safety and security of staff and inmates in such a facility.

Evidence of Jim Marshall, October 3, 2005.

14. *Mr. Blackburn also alluded to the issue of accommodation. One can only determine whether or not an accommodation issue exists once the Employer is aware of an employee's illness, injury, or disability. The whole purpose of obtaining the Physician's Certificate was to make this determination. Physician's certificates which are years old, and reference another job in another city may have no bearing, and in these circumstances, were considered by the Employer not to be appropriate. How could the Employer possibly consider accommodation if it doesn't know what is wrong.*

15. *Mr. Blackburn, throughout his submissions, refers to his request to have his annual leave credits and sick leave credits paid out in cash. The first such reference is on page 4 at paragraph 8. There is no authority to cash out sick leave credits. No authority was produced. Indeed the Collective Agreement quite specifically states that sick leave credits are earned and can only be used when an employee is sick or injured, and satisfies the Employer of their condition. As indicated in the documents filed, namely the Leave Application and Absence Report and the Collective Agreement Article on sick leave (Article 31), the declaration that the employee is ill is satisfactory unless questioned by the Employer. If questioned by the Employer, the sick leave request will be granted only if the Employer is satisfied of the employee's illness or injury. This is usually satisfied by the delivery of a Physician's Certificate.*

Exhibit E-2, Blank Leave Application and Absence Report;

Exhibit E-23, TBS UCCO SACC CSN Collective Agreement, Article 31.02 Granting of Sick Leave.

16. *No case law has been cited for the payout of sick leave credits. In addition, Ms Wendy Smith, a Pay and Benefits Clerk with CSC, wrote to Mr. Blackburn on August 14, 2003 (Exhibit G-12) and stated in paragraph 2 of that correspondence:*

> *In accordance with the Collective Agreement, we are not able to pay out in cash the hours you have to your credit for annual and sick leave.*

Exhibit G-12, letter dated August 14, 2003 from W Smith to M. Blackburn.

17. *Ms Berry indicated to Mr. Blackburn in numerous pieces of correspondence, as well as conversations, that he was entitled to utilize his sick leave credits (sick leave with pay) if he produced a Physician's Certificate. This is exactly what is stated in the Collective Agreement. Otherwise, Mr. Blackburn was on authorized sick leave without pay.*

18. *If there was any doubt with respect to what was required for Mr. Blackburn to deliver to the Employer, that was clearly dealt with in Ms Berry's letter to Mr. Blackburn on August 14, 2003 (Exhibit E-8) in paragraph 5 which states as follows:*

> *Fourth, the Physician's letter dated 13 May, 2002 identifies a medical condition, which is related to criminal charges brought against you. However, the Physician's Certificate does not reflect that you are unfit for duty.* ***You are requested to submit a current physician's letter to substantiate your inability to return to work. In the event that you wish to return to work, a Physician's Certificate is required indicating that you are fit for duty prior to your return.****"*

It is clear that the Employer is requesting from Mr. Blackburn a Physician's Certificate indicating whether or not he is fit to return to work or not. The Physician's Certificate, if it indicates he is unfit for duty, will substantiate this. By the wording of the letter, it is clear that the Employer is prepared to accept that Mr. Blackburn is unable to return to work and remain on sick leave without pay, if he provides a Physician's Certificate. The Employer is also indicating that it is willing to accept Mr. Blackburn back to work provided he provides a Physician's Certificate. The option is clearly Mr. Blackburn's to either remain on sick leave (with or without pay) or return to work. In any event and in all circumstances, a Physician's

Certificate is required either to remain away from, or return to work.

Exhibit E-8, letter dated August 14, 2003, from C. Berry to M. Blackburn.

19. *If there was any further confusion, Ms Berry sent a letter on August 22, 2003 to Mr. Blackburn (Exhibit E-9), which states at paragraph 3 "…a current Physician's Certificate to substantiate your inability to return to work. It was noted that the previous certificate was dated 13 May, 2002 …".*

Ex E-9, Letter dated August 22, 2003 from C Berry to M Blackburn.

20. *Ms Berry sent Mr. Blackburn further correspondence on November 5, 2003 (Exhibit E-12) which states at the end of paragraph 2 as follows:*

> *"If you choose to submit the certified sick leave request, it must be accompanied by a current Physician's Certificate indicating that you are not able to report for duty. Once the Physician's Certificate and Leave Request are received, your application will be considered."*

In the fourth paragraph, Ms Berry reiterates the request for a current Physician's Certificate as follows:

> *(2) a current Physician's Certificate to substantiate your inability to return to work; it was noted that the previous certificate was dated 13 May, 2002. To date, this information has not been received. The above information (written) is requested to be received by the Institution no later than Monday, 17 November, 2003. Also, the medical information must be acceptable to the Employer and satisfies the employee's performance standards. Failure to comply or report for duty with a Physician's Certificate indicating that you are fit to perform your duties will be considered of abandonment of position " and shall result in termination for cause".*
>
> *If you have any questions or concerns, please do not hesitate to contact me at 613-351-8303.*

Exhibit E-12, letter dated November 5, 2003 from C Berry to M Blackburn.

21. *It is clear Mr. Blackburn understood what was being requested of him as Mr. Blackburn filed a grievance dated November 12, 2003 (Exhibit G-38) received by both the*

Union and the Employer on November 19, 2003, which states as follows:

> *The Employer's threat to terminate my employment if I fail to comply with their request to* ***produce an updated medical certificate to substantiate my inability to work; to produce a medical certificate of fitness if returning to work.***

Exhibit G-38, Grievance dated November 12, 2003.

22. *Mr. Blackburn was delivered a response to this grievance dated December 3, 2003, and received by him on December 12, 2003, which states that:*

> *the Employer has requested on several occasions for information regarding his medical status, i.e. the production of a current Physician's Certificate. In addition, the Employer advises you of the potential consequences for failing to provide the necessary information, therefore, the grievance is denied. The Employer is obligated to advise the employee that when they return to work, a Physician's Certificate reflecting the medical status is required.* ***The Employer must be assured that the employee is able to fulfill his/her duties and responsibilities and address any restrictions or limitations as reported by the physician.***

Exhibit G-39, Level 1 Grievance Reply dated December 3, 2003.

23. *Mr. Blackburn alleges in paragraph 11 (found on pages 6 and 7 of his submission) that he submitted sick leave certificates solely for the payment of his sick leave being cashed out. This did not appear in documentation, and Mr. Blackburn was clearly told he could not cash out his sick leave credits. Mr. Blackburn, in addition in this paragraph, states that he was not an employee subject to a Collective Agreement. While it is true that Mr. Blackburn from February 11, 2002 until June of 2003 had been terminated, that termination was overturned by the Board and, as such, he was reinstated in his position with the rights and benefits, as stated by Adjudicator Henry. Mr. Blackburn was indeed entitled to the rights and benefits under the Collective Agreement during that period of time. Mr. Blackburn of course understood this as he attempted to claim parental leave and marriage leave through this period of time. Mr. Blackburn also makes the submission that he was ordered off on sick leave on the strength of the May 13, 2002 certificate. This is not the case as Adjudicator Henry made it perfectly clear that the employer should have dealt with Mr. Blackburn's*

sick leave fairly. Madame Henry made no finding with respect to Mr. Blackburn's medical condition stating quite clearly that "…only a doctor could tell whether Mr. Blackburn was fit or not fit". She did not make any determination that the medical certificate of May 13, 2002 justified Mr. Blackburn's absence from work.

Exhibit G-1, PSSRB Decision No. 166-2-20944, at para 313.

24. *ADW Berry, at no time, had any discussion with Mr. Blackburn with respect to the pay out of his sick leave credits. Ms Berry had several conversations with Mr. Blackburn, which she recorded at the time those conversations took place. The first of those conversations took place on July 16, 2003 shortly after receipt of the June 20 decision. During that conversation, Mr. Blackburn made certain enquiries regarding lost wages and benefits and enquired whether the Employer would question his fitness (Physician's) Certificate. To this request, Ms Berry advised that a decision would not be made until such time as the Employer received the certificate. Conversations took place on July 17 and July 22, and no request was made with respect to the cash out of sick leave credits. Ms Berry had a further telephone conversation with Mr. Blackburn on July 28, and again on July 30 and 31. In none of these conversations did Mr. Blackburn ever request pay out of sick leave credits.*

Exhibit E-3, Handwritten Notes of C Berry dated 16 July 03; 17 July 03; 22 July 03;

Exhibit E-5, Handwritten Notes of C Berry dated 28 July 03; 30 July 03; 31 July 03.

25. *Mr. Blackburn, in paragraph 19 of his submissions (at pages 12 and 13), states that if it was Mr. Blackburn's intention to be absent from work on sick leave using his adjusted sick leave credits, he would have informed his Employer in writing and secured a medical certificate without any protesting, objection, or submission of several modified sick leave forms, and things would not have dragged out as they did over a 6 month period.*

    In fact, Mr. Blackburn did request sick leave with pay as evidenced by Mr. Blackburn's requested sick leave with pay (uncertified) on November 12, 2003 and sick leave (certified) on that same day. The sick leave (uncertified) with pay was from June 20, 2003 to August 1, 2003 for a total of 29 days and the sick leave (certified) was from August 2, 2003 to August 22, 2003. Both these forms are found at Exhibit E-17 attached to a letter sent back to Mr. Blackburn by Ms Berry as part of the document package that was sent involving the request for the

Health Canada Assessment. They are found at pages 8 and 9 of the document. In these requests, he is asking for sick leave with pay, but ***is not*** *providing any medical certificates.*

Exhibit E-17, letter dated Dec. 3, 2003 from C. Berry to M. Blackburn.

26. *At paragraph 23 (on page 15) of his submissions, Mr. Blackburn makes some submissions with respect to the change of status, commenting that the Employer failed "to set out the particulars specific authorized leave without pay Blackburn was to be on as of December 23". Included with the letter of December 3, 2003 at Exhibit E-17, Mr. Blackburn was advised that his annual leave request was approved for the period from November 17, 2003 to December 22, 2003. At paragraph 3 of the letter of December 3, 2003, Ms Berry states:*

> *"The annual leave request has been approved for the period 17 November, 2003 to 22 December, 2003, therefore you will be returned to ACTIVE STATUS for the duration of the leave and returned to authorized leave without pay effective 23 December, 2003. Therefore, you are required to complete the Leave Application attached for authorized leave without pay commencing 23 December, 2003."*

Mr. Blackburn was keenly aware of his status on leave without pay as Ms Berry had indicated to him in Exhibit E-4 that the Employer considered him on authorized sick leave without pay. He was removed from sick leave without pay and placed on Active Service such that he could be on annual leave and collect his salary. Upon the end of his annual leave, he is no longer on active status but back on leave without pay.

Exhibit E-17, letter dated Dec. 3, 2003 from C. Berry to M. Blackburn.

27. *Mr. Blackburn attempts to portray his termination as one of discipline; the letter sent to Mr. Blackburn indicating the reasons for his termination is quite clear. The line stating that he is unsuitable cannot be read in a vacuum without reference to the entire letter. Mr. Marshall's letter quite clearly states that upon his reinstatement, the Employer requested on several occasions that he (Blackburn) provide a current Physician's Certificate to substantiate his inability to return to work. It was made quite clear that the certificate dated May 13, 2002, was not satisfactory as it did not meet the Employer's requirements, did not satisfy the employee's performance standards, and was twenty months old.*

The letter further goes on to advise Mr. Blackburn that despite the repeated request over six months to provide an appropriate and up to date medical information as to why he was unable to work and should be granted sick leave, the Employer proceeded with a Health Canada referral assessment to determine whether Mr. Blackburn was fit to work. Mr. Marshall goes on to state that the Employer's belief was that all measures had been exhausted to rectify the situation (the attempt to determine whether Mr. Blackburn was either sick and not fit to work or not sick and fit to work) either by way of his delivery (Blackburn's) of the medical documentation, or participation in the Health Canada assessment. This is what caused Mr. Blackburn's unsuitability to continue as a Correctional Officer.

Exhibit G-3, letter dated January 16, 2004 from J Marshall to M Blackburn.

28. *Mr. Blackburn makes reference to the Guide of Staff Discipline and Non-Disciplinary Demotion or Termination of Employment with Cause. It must be remembered that the Guide to Staff Discipline and Non-Disciplinary Demotion or Termination of Employment with Cause is merely a guide. It is there to provide guidance to managers in determining the appropriate course of action when dealing with certain employment matters. Clearly, Mr. Blackburn's situation was somewhat unique given that he had not actually carried out a day of work for the Employer from June of 1997 until his termination on January 16, 2004, some six (6) plus years.*

29. *In addition, Mr. Blackburn was maintaining that he was sick or unable to carry out the functions or was not sick but entitled to remain on sick leave and able to carry out the functions. The Employer made it perfectly clear in all of its correspondence what it expected of Mr. Blackburn and that the potential for him to lose his job if he did not provide the medical documentation. The Employer was more than fair in its treatment of Mr. Blackburn, giving him several opportunities to provide the necessary documentation.*

30. *In the case of Kelly v. TBS (Transport Canada), the Board dealt with a situation where a helicopter mechanic abandoned his helicopter partway through a mission and refused to carryout the remainder of the mission. The grievor was aware of his itinerary prior to departure and did not raise the concern, (which he ultimately used as an excuse to abandon his helicopter) and which was known to him prior to departure. The employer imposed a five-day suspension for his actions.*

Kelly v. TBS (Transport Canada) [1989] CPSSRB 223.

31. *At page 7 of the decision, the Adjudicator found that it was clear that the grievor knew what was expected of him. He was to accompany the helicopter on a trip along the Labrador Coast and was aware of the stops and the accommodations along the way.*

Kelly, supra, *at p. 7.*

32. *The grievor took the position that he was not informed of the possible consequences of failing to continue on the trip. The Board held that a warning of possible consequences is not a necessary condition precedent to the imposition of discipline for all forms of impropriety or potential impropriety by employees.*

Kelly, supra, *at p. 7.*

33. *Quoting Brown & Beatty in their text Canadian Labour Arbitration (3rd), Canada Law Book, 1989, the Board states that:*

> *even if the employer fails to warn an employee that serious disciplinary sanctions will be imposed for more obvious acts of misconduct, such as insubordination, theft, unlawful walk-outs…and the like, that may not be regarded as a proper basis on which to modify a more severe penalty which has been imposed for these aggravated offences.*

It was not necessary for the employer to spell out in chapter and verse the possible consequences. The grievance was denied.

Kelly, supra, *at p. 7.*

34. *It is the Employer's position that it did not have to spell out exactly what the consequences were if Mr. Blackburn did not produce medical documentation to allow the Employer to determine his fitness. Notwithstanding this, it is clear from the documentary evidence that Mr. Blackburn was aware of the potential consequences.*

35. *In addition, notwithstanding the Employer's request for Mr. Blackburn to attend a Health Canada Assessment, (albeit his refusal to do so) nothing prevented Mr. Blackburn from retaining a new family physician or returning to Dr. Yee with his medical file and obtaining a Physician's Certificate between November 28, 2003 and January 16, 2004.*

36. *In analyzing the PSSRB Decision 166-2-29044, it is clear that Madame Henry determined that the Employer had inappropriately discharged Mr. Blackburn. In essence, Madame Henry states that Mr. Blackburn reported to Milhaven Institution as he was directed and requested sick leave without pay for an indefinite period. Ms. Henry goes on the state that based on reports of what occurred, Mr. Kelly terminated Mr. Blackburn's employment on February 21, 2002. The termination was based on a matter of discipline and Madame Henry looked at the matter that occurred on February 11, 2002 to determine if there was misconduct warranting termination. Ms. Henry went on to find that Mr. Blackburn reported to work as requested on February 11, 2002 and therefore was not in violation of the Code of Discipline. She went on to find that applying for indefinite sick leave was not misconduct and that had Mr. Blackburn been denied the leave, told to remain at work, the Employer may have been justified in disciplining him (assuming he did leave Milhaven). Mr. Blackburn was not told his leave was denied, and he was not told to produce a medical certificate, (although he was asked if he had one in his possession at the time he asked for the leave).*

Exhibit G-1, PSSRB Decision No 166-2-20944, at paras 306-310.

37. *Ms. Henry made a finding that the Employer should not have assumed that Mr. Blackburn wasn't sick because he remained employed as a Police Officer with NRPS. She found that the Employer* ***did not follow*** *its normal procedures for dealing with sick leave requests. She then goes on to state that the medical evidence submitted at the hearing indicates that Mr. Blackburn suffers from an "adjustment disorder". Then poses the question "Is that condition sufficient to prevent a Correctional Officer from performing his duties?" She answers that question by stating "Only a doctor can say".*

Exhibit G-1, PSSRB Decision No 166-2-20944, at paras 311-312.

38. *Madame Henry makes no determination as to Mr. Blackburn's medical condition. She goes on in paragraph 313 of the decision to state that if the Employer had followed its own policies in dealing with sick leave, it would have requested that Mr. Blackburn submit a medical certificate. She then goes on to state that the Employer may have required Mr. Blackburn's doctors to appraise themselves of his job description, the Employer could have informed Mr. Blackburn that his leave request was denied until he produced the proper medical documentation. It is clear from reading the*

entire decision that these steps were obviously not taken by the Employer. Ms. Henry makes no determination as to Mr. Blackburn's medical condition or the medical documentation. She merely comments that it is up to a doctor to make the determination as to whether or not Mr. Blackburn is able to perform his duties. She then states that the Employer should have followed its procedures, requested a medical certificate and satisfied itself whether or not Mr. Blackburn was indeed fit or not fit. They did not and terminated Mr. Blackburn's employment. She determined that this was in fact wrong.

39. *Ms. Henry quashes the termination of the employment. She then decides what rights, benefits and privileges Mr. Blackburn would have. She states that he had the right to have his request for sick leave without pay dealt with fairly and as such, he should be granted that sick leave without pay. When one reads paragraphs 320 through 329 of the decision it is clear that Madame Henry assumes that Mr. Blackburn will be seen by his medical advisors and produce a medical certificate. This is clear by the statement at paragraph 322 where she states that:*

> *the Employer may require Mr. Blackburn be seen by its own medical advisors if it is challenging Mr. Blackburn's medical certification.*

Clearly it assumes Mr. Blackburn will produce a medical certificate. If she meant the Certificate of May 13, 2002, then it is clear from all of the documentation filed (in this hearing) that the Employer was questioning it by its repeated request for an updated one. When it did not receive one; when it felt it had exhausted that route; it referred Mr. Blackburn to Health Canada.

At paragraph 321 she states that:

> *Mr. Blackburn is entitled to be on sick leave without pay from February 21, 2002 to the date of receipt of that decision and he is entitled to the rights and privileges associated with being on sick leave without pay.*

The Adjudicator was not and is not in the position to determine whether or not Mr. Blackburn was sick or continues to be sick; whether he is fit for work or not fit for work. None of this evidence was assessed by Madame Henry.

With respect to paragraph 329, it is clear that a significant period of time had elapsed between the time of Mr. Blackburn's termination in that case, effective February 11, 2002, the hearing dates, (October 17 and

18, 2002, March 3 through 6, 2003, and May 5, 2003), and the decision (June 20, 2003). Madame Henry would not have known whether or not Mr. Blackburn would have been declared fit for work or not, or whether his criminal charges had been dealt with (given the medical evidence and evidence that Mr. Blackburn had lead at that hearing). As such, Ms. Henry is clearly contemplating that Mr. Blackburn may still be unwell, and unable to fulfill his duties as a Correctional Officer, or in the alternative, he may in fact be fit to return to work. To interpret it in any other way would not be logical. It would allow Mr. Blackburn and any other grievor to determine when they will seek a determination of their fitness for work and if they never seek that determination, they would remain in a permanent state of limbo.

Madame Henry's decision clearly contemplates the production of a medical certificate. To do so requires attendance before a certified medical practitioner. Her decision did not restrict this attendance or requirement to the time and choosing of Mr. Blackburn. Indeed both the Collective Agreement and the Leave Without Pay Policy contemplate the request being made by the Employer. It is only at the Employer's behest that this document is required. Therefore if a Medical Certificate is discussed, contemplated or suggested in the decision it is that the Employer would require one. The Employer made the request, on several occasions. It is not a logical interpretation that an employee may remain on sick leave if a medical certificate certifying his ability or inability to return to work is not produced only because the employee refuses to attend with a physician and obtain the same.

Exhibit G-1, PSSRB Decision No 166-2-20944, at paras 320-329.

40. With respect to remedies, it is the Employer's position that Mr. Blackburn's termination should be upheld and his grievance dismissed. Mr. Blackburn has requested certain remedies on pages 38 and 39 of his submissions. Notwithstanding that it is the Employer's position that Mr. Blackburn should not be reinstated, should the Chairman determine otherwise, Mr. Blackburn should not be put in the position which would see him receive anything more than he would have received had he not been terminated.

At the time of his termination, Mr. Blackburn was on sick leave without pay, therefore, Mr. Blackburn would not be entitled to any salary or benefits other than those which may have accrued while he was on sick leave without

pay. The appropriate Collective Agreement provides that Mr. Blackburn earns vacation credits and sick leave credits at a certain rate based on days worked. As Mr. Blackburn was on, and would continue to be on, sick leave without pay, he is not entitled to a salary, nor would any credits accrue.

With respect to any return to work, Mr. Blackburn would be required to satisfy the Employer of his fitness to return to work and operational requirements (as determined by the Employer) would determine where Mr. Blackburn would be required to work.

41. *Mr. Blackburn has asked for damages for mental anguish and humiliation. Mr. Blackburn has not provided any evidence of any damages with respect to mental anguish and humiliation and as such, this must be dismissed outright.*

42. *No costs should be awarded with respect to this matter.*

Matthews v. Canadian Intelligence Service, *CPSSRB No. 31, at paras 100-104.*

Part II - Review of Grievor's Case Law

Chander P. Grover v. National Research Council of Canada

43. *This is a recent decision of the PSLRB heard before Vice Chair Sylvie Matteau, sitting as an Adjudicator. The decision is the subject matter of a Judicial Review application issued in the Federal Court of Canada, file no. 1975-05 on November 1, 2005.*

Appendix A, Tab 1 – Notice of Application for Judicial Review dated November 5, 2005.

44. *Notwithstanding the Judicial Review Application, this case is clearly distinguishable from Mr. Blackburn's case. Dr. Grover, when he indicated that he was not feeling well, made appointments with his doctors and obtained current "medical certificates".*

45. *At paragraph 18 of the PSLRB Decision, it states:*

> *Following a January 20, 2004 meeting, Dr. Grover, not feeling well, made an appointment with his doctor and a medical certificate was issued on January 24, 2004. This certificate prescribed him to take "stress leave for four weeks, spread over eight weeks, as required". The medical certificate was accepted by his employer and the sick leave was authorized.*

Grover v. National Research Council of Canada, *PSLRB Decision No. 166-9-34836 at para 18.*

46. At paragraph 21: Dr. Grover again attended his physician on March 30, 2004 and was issued another prescription from his physician effective April 2, 2004. Again this medical certificate was accepted by his employer.

Grover, supra*, at para 21.*

47. It was only when Dr. Grover obtained a third medical certificate from a different doctor, prescribing the same treatment did the employer question the medical certificate and not accept same. When this occurred, the employer referred Dr. Grover to a Health Canada Physician.

Grover, supra*, at para 33.*

*48. When the employer was not prepared to accept the third medical certificate, the employer instructed the grievor **not to present himself at work** until such time as a medical assessment was carried out. Dr. Grover continued to attend at work despite instructions not to do so.*

Grover, supra*, at paras 27, 28, 31, 33 and 40.*

49. Dr. Grover did attend a medical examination. The examination was quite lengthy. However, a dispute between the physician and Dr. Grover did not permit the examination to be completed or an assessment made.

Grover, supra*, at paras 41-42.*

50. Dr. Grover was disciplined for "acts of insubordination", namely returning to work when ordered not to do so; and for his behavior in responding to the requests for attendances for medical examinations.

51. In her findings, Vice Chair Matteau finds at paragraph 141 that the employer had many options and ignored the usual process for questioning of a tendered medical certificate. She went on to state that Dr. Grover never had the opportunity to provide further information from his physicians because he could never get a clear answer from the employer as to what they were looking for.

Grover, supra*, at para 141*

In Mr. Blackburn's case, the Employer exhausted this process by repeatedly requesting from Mr. Blackburn an

updated current medical Physician's Certificate from his family physician. It was only after Mr. Blackburn repeatedly refused to produce a current updated Physician's Certificate that the Employer resorted to requesting a Health Canada Assessment.

52. *At paragraph 142 of her decision, Vice Chair Matteau states that "the request for an independent medical examination to determine fitness to work should be considered only in exceptional and clear circumstances. The justification for it should also be fully disclosed to the employee".*

Grover, supra*, at para 142.*

53. *In Mr. Blackburn's case, it is clear that the reasons for the Health Canada medical examination were disclosed to Mr. Blackburn, being that he had failed to provide any sort of medical documentation that was current that would indicate whether he was fit or unfit for duty.*

Exhibit E-17, letter dated December 3, 2003 from C Berry to M Blackburn.

54. *In the Grover case, Vice Chair Matteau made a finding that Dr. Grover was performing his duties adequately all along. Mr. Blackburn had not been doing any actual work for the Employer for a period of almost seven years; was not returning to work and requesting sick leave. Indeed, this entire situation arose due to Mr. Blackburn's request for sick leave when requested to return to work back in February of 2002.*

<u>Jean Pelletier v. Attorney General of Canada</u>

55. *This was an Application for Judicial Review by the applicant, Jean Pelletier, the Chair of the Board of Directors of Via Rail Canada Inc., against his termination by Order in Council.*

56. *The Application came on for a hearing in November of 2005. The decision, in short, found that in cases of discipline, the employer is required to comply with a duty of fairness and in the case involving Mr. Pelletier, the Court felt that this duty had not been met. The Court's Decision (found at paragraphs 94 and 95) reinstates Mr. Pelletier, however, in doing so, does not make a finding that the termination was incorrect, but that a duty of fairness and proper procedure must be followed. This matter has been appealed.*

Appendix A, Tab 2 – Notice of Appeal dated December 19, 2005.

57. Mr. Blackburn's case is not one in which discipline is in issue. No investigation need take place. Mr. Blackburn was fully aware of all of the facts giving rise to his termination.

William Burrow v. Canada Customs and Revenue Agency

58. This is an Expedited Adjudication Decision and as such, the decision is binding and cannot constitute a precedent or be referred for Judicial Review to the Federal Court.

59. Notwithstanding the paragraph above, this matter does not appear to have any bearing whatsoever on Mr. Blackburn's case.

Marois and Hubert v. Treasury Board (CSC)

60. This was a case involving the duty to accommodate Correctional Officers who were pregnant and were seeking maternity-related reassignment or leave.

61. This comes under a special section of the Correctional Services Collective Agreement, namely Article 46. Article 46.02 refers specifically to an "independent medical opinion".

62. In the present case, there is no need for an independent medical opinion, nor is one required. The issue was that the Employer wanted a "medical certificate" either indicating that Mr. Blackburn was either fit or not fit for work. The Employer would have been happy to receive a medical certificate from Mr. Blackburn's physician of choosing, and had requested this on several occasions. When Mr. Blackburn was not producing said certificate, the Employer requested Mr. Blackburn attend a Health Canada assessment to make this determination, to which he refused to cooperate.

Sharon-Rose Taylor v. Treasury Board (DIAND)

63. This is a case involving a suspension wherein an employee refused to attend a meeting. Apparently, there was some confusion with respect to a request for a postponement of the meeting and as such the failure to attend was the result of a legitimate and compelling personal excuse. As such, the grievance was allowed. This case appears to have no bearing whatsoever on Mr. Blackburn's case.

Dubois v. Treasury Board (CIDA)

64. This is a case with respect to the interpretation of the Foreign Service Directives involving an employee who is

diagnosed with an adjustment disorder and with a depressed mood. It was determined by her physician's that she was a carrier of tuberculosis and was prescribed a particular treatment. It would appear that her adjustment disorder and mood depression were linked to the side effects of the treatment. The determination by the Adjudicator was that there was a link to the work stoppage by the grievor vis à vis the initial illness which permitted the benefits under the Foreign Service Directives.

65. *Again this case has nothing to do with Mr. Blackburn's situation. Mr. Blackburn's Attending Physician's, at best, can suggest that the ongoing situation he found himself in through 1997-1999, with the NRPS, caused him probleMs. There is no medical documentation with respect to CSC.*

Ex G-19, letter dated August 4, 1999 from Dr. Shukla to Dr. Teodorini;

Ex G-20, Attending Physicians Statement of Dr. Teodorini dated February 18, 1998;

Ex G-21, letter dated January 21, 1998 from Dr. Wright to Dr. Teodorini;

Ex G-22, letter dated May 13, 2002 from Dr. Teodorini to "whom it may concern".

Loyer v. Treasury Board (CSC)

66. *This is a case involving a termination of an employee where the termination was based on the discipline for not participating in the medical assessment. The employee was advised that he would be disciplined if he did not cooperate. In addition, Mr. Loyer was never requested to provide a report from his treating physician.*

Loyer v. Treasury Board (CSC)*, at para. 112.*

67. *Mr. Loyer was suspended without pay and then terminated at a disciplinary meeting. The decision of the Adjudicator is found at paragraph 119 through 121. It was determined that the dismissal would be rescinded, however, Mr. Loyer was not reinstated and was given compensation in lieu of reinstatement.*

Loyer *, supra, at para. 119-121.*

68. *Mr. Blackburn:*

    i) *was not disciplined;*

ii) was requested on several occasions to provide a current medical certificate from his own physician;

iii) he was only asked to attend a Health Canada Assessment when he failed to produce a current Physician's Certificate;

iv) he was terminated as the Employer could not determine his fitness or lack thereof to carry out his job functions and had exhausted means available to it.

Rosekat v. Treasury Board

69. This appears to be a case involving the scheduling of vacation leave. This has no bearing whatsoever on the within decision. Mr. Blackburn would have had any annual leave credits cashed out upon his termination.

Maan v. Treasury Board (Transport Canada)

70. This was a case involving termination for negligence, abuse of authority and insubordination.

71. The Adjudicator held that the grievor could be reinstated immediately, however, without pay during the period of the disciplinary investigation. The Adjudicator also held that the grievor had rehabilitative potential and reinstated the grievor.

72. This case has absolutely no relevance with respect to Mr. Blackburn's case. Mr. Blackburn was not terminated for disciplinary matters. The question of rehabilitation is not an issue. Mr. Blackburn was terminated as the employer could not determine whether he was fit or not fit to carry out the functions of a Correctional Officer.

Boucher et al. v. Treasury Board (HRDC)

73. This was a case in which an employee was given a financial penalty for refusing to follow an instruction given to him with regards to attending work during a pay strike when faced with demonstrators and picketers.

74. Again, this case has no bearing whatsoever on the case at bar. This is a discipline case with respect to the non-attendance at work by otherwise designated employees who were crossing a picket line. It is in no way similar or has any bearing on Mr. Blackburn's case.

75. Mr. Blackburn:

i) was not a designated employee during a strike, nor crossing a picket line;

ii) was not disciplined.

Higgs v. Treasury Board (CSC)

76. This is another case involving the use of annual leave and the carryover of annual leave. Again, this has no bearing on Mr. Blackburn's case, as Mr. Blackburn would have received any annual leave cashed out during his termination.

Jones v. Treasury Board (DND)

77. This is an Expedited Adjudication Decision which decision is final binding, cannot constitute a precedent, or be referred to judicial review. Notwithstanding, this is a case involving discipline. It has not bearing whatsoever on Mr. Blackburn's case.

Burton v. Treasury Board (CSC)

78. This is a case involving a Correctional Supervisor and the conduct by that Correctional Supervisor, both in the course of his duties as a Correctional Supervisor and while off-duty (criminal charges of assault). Again, this is a discipline case and has not bearing on Mr. Blackburn's case.

Constantini v. Treasury Board (DND)

79. This is an Expedited Adjudication Decision and as such, the decision is binding and cannot constitute a precedent or be referred for Judicial Review to the Federal Court.

80. Notwithstanding the paragraph above, this matter does not appear to have any bearing whatsoever on Mr. Blackburn's case.

Dhaliwal v. Treasury Board (CSC)

81. This is a case involving a rejection on probation. This is a case in which an allegation was made by the grievor that the rejection was a "sham" or camouflage. Adjudicator Quigley made a finding in this case that in fact although there may have been an employment-related issue, the employer has failed to abide by the principle of fairness and good faith involving issues involving rejection on probation and as such reinstated the grievor.

82. The case involving Mr. Blackburn is not one of a rejection on probation. There is no evidence of a sham or camouflage.

[*Sic* throughout]

[Emphasis in the original]

[76] The additional submissions on behalf of the grievor are as follows:

> *I write this letter seeking your consideration for limited additional arguments that did not come to the forefront of my mind at the time of completing my submission in response to the Employer's submission. I am not asking to repeat this step every time a thought comes to mind that I didn't cover. I am only seeking to add a miniscule follow up. The arguments are quite relevant in addressing a number of issues that will highlight further inconsistencies in the Employer's case and argument. I have forward a copy of these additional arguments to Mr. John Jaworski, Legal Cousel for the Treasury Board for his consideration, input and objections, if any. As I review the PSSRA I didn't see anything that prohibits you from accepting this follow up so long as the other side is giving an opportunity to respond to what is set out specifically in the follow up. Please advise me if this request is in violation of the Act or protocol and provide to me the authority.*
> *Thanks.*
>
> *With respect to the following paragraphs of the Employer's submission of November 15, 2005 Blackburn addresses the following:*
>
> *Paragraph 18: As stated at the hearing before Adjudicator Henry and at this hearing before you, Blackburn sole purpose for attending Millhaven on the 11th of February, 2002, was out of an abundance of caution because he feared, notwithstanding his letter of January 21, 2002 (E28) to Warden Lou Kelly, that if he didn't show up as instructed his employment would be terminated for not reporting to duty, and in fact that is what Warden Kel1y claimed was the reason for Blackburn's eventual termination effective February 11, 2002, to which Mrs. Henry did not accept. (refer to paragraph 143 of G1)*
>
> *Paragraph 21 (vii): Notwithstanding that this statement speaks for itself, I find it necessary to add to my argument that Deputy Chairperson Evelyn Henry recognized that the medical evidence setting out Blackburn's adjustment disorder were reached by medical experts (**doctors**) and as such she rhetorically stated "only a doctor can tell" to which as I recall is what I testified to as rebuttal when the Employer argued that she made no finding as such. The medical evidence (G19, G20, G21 & E7) were clearly authored by a family doctor (Teodorini) and by two independent psychiatrists (Wright and Shukla) and not by any other unqualified professional, as Henry was keenly aware of and to which you can see for yourself upon review of the medical evidence,*

stating that Officer Blackburn suffered from an Adjustment Disorder and should be off work until the resolution of the criminal charge(s).

*Paragraph 27: As stated Ms. Berry acknowledge that as of the **date of the decision** and **not as of February 11, 2002,** she and the Employer interpreted the decision as placing Mr. Blackburn on **authorized sick leave without pay**. Clearly, she recognized that I was not on sick leave, with or without pay, from February 11, 2002 to June 20, 2003 and she and the employer have never asserted that I was on sick leave with or without pay as of that date. Clearly, the placing of Blackburn on sick leave without pay was a result of two things, 1) the medical evidence and argument submitted and made by Officer Blackburn and 2) the errors made by the Employer and their argument to justify their errors. However, at paragraph 91, in contrast to paragraph 27, Ms. Berry, Mr. Marshall and the Employer are stating that as of June 20, 2003, Mr. Blackburn is employed with the CSC as a CX-01 at Millhaven Institution and is **on leave without pay**. If Blackburn is on leave without pay as of June 20, 2003 in contrast to the decision and the Employer's statement at paragraph 27, how did he arrive at this designation/status when he had not applied for leave without pay and no applicable leave application was entered as an exhibit by the employer to confirm this? If he was on leave without pay as of June 20, 2003, how and when did his status change to sick leave without pay as of June 20, 2003 and where is the documentary evidence showing how this status came about?*

*Paragraph 53: The Employer acknowledge that the medical evidence from Dr. Wright stated that **Officer Blackburn was not fit and won't be fit until the dispute is settled**. Therefore, they were clearly aware in 2002/2003 during the grievance process/hearing, where the medical evidence were introduced, that Blackburn was not fit for duty/work with NRPS and CSC. The employer argued before Chairperson Henry that no reference was made to employment with CSC to which she did not accept and gave her reasons for not accepting this argument. For the employer to now reargue the same point before you that none of the medical evidence reference CSC is beyond my comprehension (review paragraph 154 to 161). It is clear that the grievance before Henry came about in part because the employer at that time were of the view that Officer Blackburn was indeed fit since he was working full time with NRPS (see paragraph 73 to 75 of G1) and therefore did not buy his claim, as set out in his January 21, 2002 letter (E28), that he was not fit to return to CSC and resume his duties until the charge was resolved and he's declared fit to return.*

> *Paragraph 54: The Employer acknowledge that the medical evidence from Dr. Teodorini stated that* ***Officer Blackburn was not fit and that he will be able to return to work when the present conflict/dispute is resolved.*** *The employer also recognized that Dr. Teodorini noted that Blackburn* ***was not a candidate for "modified duties"*** *and marked the applicable box with "No" to which NRPS ignored and assigned Blackburn to modified duties in the Alternate Response Unit (ARU) over his doctor and his objections.*
>
> *Paragraph 56: The Employer for the third time acknowledge that the medical evidence from Dr. Shukla* ***stated that Officer Blackburn should be suspended with pay from the Police Force (NRPS) until the charges have been dealt with.*** *Conclusion -* ***all three doctors have clearly stated that Blackburn should be off work until the charge/dispute is settled/resolved,*** *giving his mistreatment by NRPS and then his mistreatment by CSC upon CSC finding out that he was charged criminally, thus adding to his stress.*
>
> *Paragraph 91: First part of this paragraph conflicts with paragraph 27 to which I have alluded to above.*
>
> *Paragraph 92: First part of this paragraph conflicts with paragraph 91. If the employer was clear that Officer Blackburn was on leave without pay as of June 20, 2003, then how did he come to be on sick leave without pay on July 24, 2003, some four weeks later?*
>
> [*Sic* throughout]
>
> [Emphasis in the original]

[77] The employer's reply of January 27, 2006, is as follows:

> *In Mr. Blackburn's letter of January 13, 2006, he referenced various paragraphs and submissions contained in the Employer's submissions. I will refer to those paragraphs that he has identified in his letter of January 13, 2006 and provide my comments.*
>
> *Letter page 1, Reference to paragraph 18.*
>
> *The Employer repeats and relies on the allegations and arguments found at paragraphs 17 through 19 of its written submissions.*
>
> *Whatever Mr. Blackburn states was his intent on February 11, 2002 is irrelevant, either he was fit to return to work, or was not fit to return to work. Mr. Blackburn brought the issue to the forefront by attending at the Institution and claiming to be sick. He requested a Leave*

Request Form and filled it in requesting sick leave. The only logical conclusion which can be reached from his action is that he was unable to work because he was sick.

Employer's Submissions paras 17-19;
Exhibit G-1, paras 86-90, 93, 94, 96, 103,106, 127, 148-150;
Exhibit G-2, Leave Application Form dated Feb. 11, 2002.

Letter page 1 and 2, Reference to paragraph 21 (vii)

The Employer repeats and relies on the allegations and arguments found at paragraphs 51 through 58 of its written submissions.

All of the physicians' letters that were filed dealt with a review of Mr. Blackburn's condition, which was vis à vis his involvement with the NRPS. There was and is no evidence that any of these physicians knew of Mr. Blackburn's employment with the CSC. There is no evidence that Mr. Blackburn was unable to carry out his functions as a Correctional Officer. The assessments and comments made by Mr. Blackburn's physicians were vis à vis his employment with the NRPS.

At best the letters are hearsay. The physicians were not called to give their medical opinion; nor did the Employer have the opportunity to cross-examine them. The statements contained therein cannot be considered as expert evidence. In no way did Adjudicator Henry accept these statements as evidence, expert or otherwise, to justify Mr. Blackburn's absence from work. While Mr. Blackburn may have suffered from a specific condition at the time he was examined by the physicians, there is absolutely no evidence that it had any bearing on his duties or abilities to carry out those duties as a Correctional Officer. There is no evidence that as of June 2003 through January 2004 these conditions, or others, may have existed.

Employer's Submissions paras 51-58;
Exhibits G-19 through G-22, Medical Letters.

Dr. Shukla, in his letter dated August 4, 1999 states as follows:

> *"He claims he is stressed out and having problems at work. He is a* ***Police Constable for Niagara Regional Police Force*** *and having a lot of problems at work. He claims at present his livelihood is threatened as they are trying to get rid of him… If they can send him to jail, they will have grounds to fire him* ***from the Police Force."***

> *"Further, this will be my recommendations to the **Police Force** that he should be suspended with pay until the charges have been dealt with. He is **working at the station** doing office duties while charges are pending. This adds further stress".*

Exhibit G-19, letter of Dr. Shuckla dated August 4, 1999.

Dr. Wright, a psychiatrist, states in his correspondence dated January 21, 1998:

> *"Meichland recounts a long history involving conflict with the **Niagara Regional Police** that extends over eight years."…."He fought to be reinstated over a period of seven years and eventually was in May of 1997. There have been two subsequent off-duty incidents involving OPP Officers. He was involved in a dispute regarding a traffic ticket, and a speeding offence. As a consequence, he currently is charged under the **Police Act** and is represented by his own lawyer and by his Association. Seemingly, the OPP Officer said that violence had been threatened. As a consequence, Meichland has been **reassigned to Headquarters** work. He finds this very stressful because he believes that the people who will be sitting in judgment of him are there on a daily basis, and he inevitably has to interact with them. "*
>
> *"Because of the particular circumstances in which he finds himself, he is under a great deal of **daily stress in the workplace**, and this seems likely to continue until such time as he is reassigned to regular duties".*

Exhibit G-21, letter dated January 21, 1998 from Dr. Wright to Dr. Teodorini.

It is clear from these pieces of correspondence that although Mr. Blackburn may have been suffering from certain ailments, these were specific to his work with the NRPS, and the physicians addressed that particular issue.

<u>Letter page 2, Reference to paragraph 27</u>

The Employer repeats and relies on the allegations and arguments found at paragraphs 21(ix) and 27 of the its written submissions.

Adjudicator Henry states quite clearly at paragraph 321 of her decision that Mr. Blackburn is entitled to all the rights and privileges of being on sick leave without pay from February 21, 2002 to the date of receipt of this decision (which was dated June 23, 2003).

The exact date that the decision was received by the Employer is unknown but it can be assumed that it is sometime between June 23, 2003 and July 16, 2003, the date that Ms. Berry spoke to Mr. Blackburn for the first time. In any event, the only status Mr. Blackburn can be on during this period is sick leave without pay.

Mr. Blackburn had applied for Leave Without Pay on February 11, 2002 (Exhibit G-2). Exhibit E-4 clearly states the Employer's position. It considered Mr. Blackburn to be on Sick Leave Without Pay.

Employer's Submissions paras 21 and 27;
Exhibit G-1, para. 321;
Exhibit G-2, Leave Application Form dated Feb. 11, 2002;
Exhibit E-4, letter dated July 24, 2003 from C Berry to M Blackburn.

Letter page 2, Reference to paragraph 53

The Employer again repeats and relies on the allegations and arguments found at paragraphs 51 through 58 of its written submissions.

The statements made in the letters produced by Mr. Blackburn from the various physicians can only be given so much weight. Whatever Dr. Wright stated about Officer Blackburn not being fit for work on January 21, 1998 until the dispute is settled can only be interpreted vis à vis Mr. Blackburn's position at the time Dr. Wright encountered Mr. Blackburn. At this time, Mr. Blackburn was on a 1 year Leave of Absence from CSC as authorized by Warden (as he then was) Lou Kelly. Mr. Blackburn's Leave of Absence was from June 1, 1997 to May 31, 1998. Mr. Blackburn's activities and problems, criminal, medical or otherwise, clearly cannot be related to events that were to occur some 4 years in the future with another Employer (CSC).

Madame Henry's decision clearly makes no finding of fact on Mr. Blackburn's medical condition. It does not accept the assessments of the physicians, however, clearly those assessments are at a particular point in time dealing with a particular set of circumstances that existed at the time those letters were written. None of those physicians (from the information provided in the letters) have any indication that Mr. Blackburn was employed with the CSC (except in the past tense, while awaiting reinstatement with NRPS); what his job position would entail; or whether he would be able to carry out the functions of that job. The only assessments that those physicians made were vis à vis his position as a Police Constable with the NRPS and the difficulties he was experiencing in that job, with that employer, at that time.

There is no indication that any of these physicians looked at Mr. Blackburn's condition and circumstances with respect to any other position Mr. Blackburn may or may not have held. They were not asked to make this assessment, nor did they do so.

Indeed, the very fact that Mr. Blackburn's physicians may have felt that certain circumstances warranted him being away from his position with the NRPS did not in fact keep Mr. Blackburn from attending and carrying out certain modified functions of that position. It would appear that Mr. Blackburn's contention is that because certain doctors felt he was not able to carry out certain functions as a Police Officer, that he could not carry out the functions of any other position. This is not the case. There may have been ample reason for Mr. Blackburn not being in a position to carry out his functions as a NRPS, and in the correspondence of the physicians, this was made clear. However, no such assessment was done for Mr. Blackburn's position as a Correctional Officer, or any other position he may have chosen to obtain. Could Mr. Blackburn occupy the position of a truck driver; cab driver; fire fighter; or any other position, which he may or may not have been qualified for, is not something that these doctors assessed, or gave any opinion.

Employer's Submissions paras 51-58;
Exhibits G-19 through G-22, Medical Letters.

Letter page 2 and 3, Reference to paragraph 54

Again, the Employer repeats and relies on the allegations and arguments found at paragraphs 51 through 58.

Mr. Blackburn is yet again taking statements made by physicians and psychiatrists out of context. Mr. Blackburn's reference that Dr. Teodorini noted that Blackburn was not a candidate for modified duties, is found in Exhibit G-20, which was a form filled in by Mr. Blackburn's family physician Teodorini in February of 1998. It was in specific reference to his duties with the NRPS. It was on a NRPS Medical Assessment Form.

Employer's Submissions paras 51-58;
Exhibits G-19 through G-22, Medical Letters.

Letter page 3, Reference to paragraph 56

Again, the Employer repeats and relies on the allegations and arguments found at paragraphs 51 through 58.

There has never been a reference by any of the physicians about "Mr. Blackburn's mistreatment by CSC". Mr. Blackburn has added this. Again, the Employer repeats

> *its submission that none of these physicians were aware of Mr. Blackburn's employment relationship with the CSC when they made their diagnosis; prognosis; and gave their advice. Notwithstanding this position, all of these medical reports are clearly out of date. At the time of the first request by the Employer in July of 2003 for an updated Medical Certificate, the letters that Mr. Blackburn submitted at the hearing were five (5) years, four (4) years, and fourteen (14) months out of date.*
>
> ***Employer's Submissions paras 51-58;***
> ***Exhibits G-19 through G-22, Medical Letters.***
>
> *Letter page 3, Reference to paragraph 91 and 92*
>
> *The employer repeats and relies on the allegations and arguments found at paragraphs 91 through 96, and Exhibit E-4.*
>
> *The letter (Exhibit E-4) is quite clear: "You are on sick leave without pay. If you wish to remain on sick leave without pay, produce a medical certificate. If you wish to return to work, produce a medical certificate". Mr. Blackburn had two options: return to work or don't return to work. In either case, a medical certificate is being requested.*
>
> ***Employer's Submissions paras 91-96;***
> ***Exhibit E-4, letter dated July 24, 2003 from C Berry to M Blackburn.***
>
> [*Sic* throughout]
>
> [Emphasis in the original]

Reasons

[78] Mr. Blackburn grieved his employer's decision to terminate his employment as a correctional officer for cause on January 16, 2004.

[79] The genesis of this unfortunate situation is the Henry decision (Exhibit G-1), which returned Mr. Blackburn to work in June 2003, following his initial termination of employment in February 2002. At paragraph 320 of her decision, adjudicator Henry stated that Mr. Blackburn was entitled ". . . to have his request for sick leave without pay for an indefinite period dealt with fairly. . . ."

[80] The somewhat conflicting language used by adjudicator Henry in her decision led to a disagreement about what would happen following Mr. Blackburn's reinstatement in June 2003.

[81] The grievor, to his detriment, latched on to certain words in the Henry decision, taking them out of context and using them as a shield against any attempt by the employer to obtain updated medical information to support his continued absence from work.

[82] Mr. Blackburn ignored those portions of the Henry decision which clearly stated that the employer could challenge his medical certificate and ask that he be examined by the employer's own medical advisors. Rather, he chose to believe that the Henry decision placed him on sick leave without pay for as long as he wished and thus precluded the employer from looking into his medical status. Mr. Blackburn did so at his own peril.

[83] Given the meagre medical information on file and its doubtful relevance to Mr. Blackburn's work as a correctional officer, the employer had both a right and a duty to ascertain the grievor's medical fitness to perform his work. Although Mr. Blackburn appears to have been aware of his obligation to apprise the employer of his medical condition (Exhibit G-24, page 3), he nevertheless ignored repeated requests for updated medical information.

[84] The grievor made conflicting comments as to his fitness to work, leaving the employer no alternative but to seek clarification. At the hearing, Mr. Blackburn affirmed that he cannot work with people in management who sit in judgment of him while at the same time arguing that there is no evidence that he cannot perform his work as a correctional officer. Add to that the grievor's repeated requests for leave without pay and you have a recipe for confusion which begs clarification.

[85] At every turn, Mr. Blackburn, through equivocation and tergiversation, successfully thwarted his employer's appropriate and necessary attempts to obtain current and relevant medical information. Given Mr. Blackburn's repeated refusal over several months to provide updated medical information as to his fitness or unfitness to work, the employer was well within its rights to ask for a Health Canada assessment. The grievor's refusal to cooperate placed the employer in an untenable position.

[86] As per the collective agreement and the employer's policies, the granting of sick leave, with or without pay, is conditional on the existence of an illness or injury that prevents the employee from performing his or her work. The employer has the right to ask for relevant medical information to verify and satisfy itself of the existence of

illness or injury, especially in cases such as this one where the employee wishes to be absent for an indefinite period of time.

[87] At the time of Mr. Blackburn's termination in January 2004, the employer had no indication that the grievor would be in a position to return to work in the foreseeable future. Mr. Blackburn had an obligation to help the employer obtain an assessment of his condition. His failure to do so led to the eventual termination of his employment.

[88] The employer, therefore, had a valid reason to terminate Mr. Blackburn's employment.

[89] In one of his letters (Exhibit E-11) and at the hearing, Mr. Blackburn raised the possibility that the employer's actions were motivated by racism. There is absolutely no evidence before me to support this claim.

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

(The Order appears on the next page)

Order

[91] Mr. Blackburn's grievance is denied.

April 19, 2006.

Yvon Tarte,
adjudicator