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Citation: 2007 PSLRB 77

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

SYLVAIN DUBÉ AND KEVIN PITON

Grievors

and

TREASURY BOARD
(Department of National Defence)

Employer

Indexed as
Dubé and Piton v. Treasury Board (Department of National Defence)

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

REASONS FOR DECISION

Before: Léo-Paul Guindon, adjudicator

For the Grievors: Jean Saint-Pierre, counsel

For the Employer: Stéphane Hould, counsel

Heard at Québec, Quebec,
August 15, 2006.
(P.S.L.R.B. Translation)

I. Grievances referred to adjudication

[1] Sylvain Dubé filed a grievance contesting the employer's decision to deny him leave with pay for a routine dental appointment on March 9, 2004. Kevin Piton filed a grievance contesting the employer's decision to deny him leave with pay for a routine medical appointment on January 23, 2004. The grievors allege that those decisions by the employer contradict both the Treasury Board's *Leave With Pay Policy* ("the policy") and the *Civilian Personnel Administrative Order (CPAO) 6.29* (CPAO) (Exhibit F-10). Mr. Piton also alleges that those decisions are unfair and that the employer discriminated against him because it approved similar requests from other employees.

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

II. Preliminary objection

[3] Before the hearing, the employer submitted in its preliminary objection that the grievors' grievances cannot be referred to adjudication under section 92 of the former *Act*, which only allows grievances on the interpretation or application of a provision of a collective agreement, an arbitral award or disciplinary measure leading to termination of employment, a suspension or a financial sanction to be referred to adjudication. According to the employer, the grievors based their grievances on the policy and on the CPAO. The policy and the CPAO are not part of the collective agreement applicable to these cases, which is the one that was signed by the Treasury Board and the Public Service Alliance of Canada on November 19, 2001 for the Operational Services Group bargaining unit ("the collective agreement") (Exhibit F-2). Section 92 of the former *Act* would not allow these grievances, which are based on the policy and the CPAO, to be referred to adjudication.

[4] Furthermore, the employer submitted that the grievors cannot modify the grievances when they are referred to adjudication, indicating that at that stage of the process, they fall under article 52 of the collective agreement. It argued that *Burchill v. Canada (Attorney General)*, [1981] 1 F.C. 109 (C.A.), states that the nature of the grievance cannot be altered to make it adjudicable under section 92 of the former *Act*. That principle would also have been applied in *Schofield v. Canada (Attorney General)*, 2004 FC 622, *Canada (Attorney General) v. Shneidman*, 2006 FC 381, and *Shneidman v. Canada (Attorney General)*, 2007 FCA 192.

[5] The parties agreed to address the preliminary objection at the hearing.

[6] At the hearing, the employer's counsel submitted that decisions rendered at the final level of the grievance process, on grievances presented by grievors, are final and binding under subsection 96(3) of the former *Act* and that no further measures may be taken with respect to those grievances.

[7] According to the grievors' counsel, the adjudicator must ensure that the employer understands the nature of the grievors' requests from the wording of the grievances. Mr. Dubé included the policy in Appendix 3 of his grievance, which specifies that leave must be approved under the appropriate authorities, meaning the collective agreement. For routine medical and dental appointments, the policy provides that the employer shall approve at most one half day of leave with pay (Appendix A of the policy).

[8] Clause 52.01(b) of the collective agreement provides that the employer may, at its discretion, grant leave with pay for purposes other than those specified in the collective agreement. The policy provides for leave with pay for the purpose of a routine medical or dental appointment. Thus, the policy sets the boundaries for the employer's exercise of its discretionary authority.

[9] The employer's responses at the various levels of the grievance process refer to the policy and to the employer's discretionary authority to grant leave with pay for a routine dental or medical appointment. Those responses show that the employer knew the nature of the grievances during the hearings at the various levels of the grievance process. The fact that the grievances do not specify the collective agreement provision on which they are based does not change their purpose in any way. Specifying the collective agreement provision on the adjudication referral form does not change the

nature or purpose of grievances that pertain to the exercise of discretionary authority. The employer's discretionary authority to grant other leave is provided in clause 52.01(b) of the collective agreement and is the same as that contained in the policy. In both cases the issue remains the same: could the employer deny the grievors leave with pay taking the policy into account?

[10] The grievors' counsel cited the following decisions: *Canada (Treasury Board) v. Rinaldi*, [1997] F.C.J. No. 225 (T.D.) (QL); *Association des employés de garage de Drummondville (CSN) c. Gougeon & Frères ltée* (16 April 1992), Montreal 500-09-0010902T-543 (C.A. Qc); *Lannigan v. Treasury Board (Correctional Service of Canada)*, 2006 PSLRB 34; *Gingras v. Treasury Board (Citizenship and Immigration Canada)*, 2002 PSSRB 46; *Batiot et al. v. Canada Customs and Revenue Agency*, 2005 PSLRB 114; *Krenus v. Treasury Board (Solicitor General Canada – Correctional Service)*, 2003 PSSRB 62; *IGA L.A. Daigneault et fils ltée v. Travailleurs et travailleuses unis de l'alimentation et du commerce, section locale 500* (28 May 1998), 98-06300 (T.A.Q.); and *Bonar inc. c. Syndicat canadien des communications, de l'énergie et du papier, section locale 847 (SCEP)* (13 July 1998), 98-07336 (T.A.Q.).

[11] In response, the employer's counsel submitted that the subject of the grievances presented at the various levels of the grievance process is that leave with pay is seen as being discretionary under the policy. The employer did not assess, at the various levels of the process, whether its decisions represented alleged violations of article 52 of the collective agreement.

[12] According to the employer's counsel, the adjudicator's jurisdiction, under section 92 of the former *Act,* is limited to issues pertaining to the interpretation or application of the collective agreement in respect of an employee. The issue of the application of a policy is different from that of a collective agreement and the former *Act* only allows referral to adjudication in the second case. In the last round of negotiations, the parties could have included the policy with the collective agreement, which is not the case with these grievances.

[13] The employer's counsel suggested, in its responses at the various levels of the grievance process, that the employer referred to the discretionary authority contained in the policy. That discretionary authority is different from the discretionary authorities provided in the collective agreement, which were subject to negotiation.

[14] The preliminary objection was taken under reserve. The parties were asked to proceed based on the grievances.

III. Summary of the evidence

[15] Mr. Dubé has held an instrumentation and control technician position since 1998 in the Mechanical and Electrical Workshop, Engineering Unit, 5 Area Support Group, Valcartier Garrison, Department of National Defence. His work schedule is 07:45 to 16:15, Monday to Friday. He generally works alone. On February 3, 2004, he filled out a leave form for a routine dental appointment for the morning of March 9, 2004 (Exhibit F-8). The appointment had been scheduled for 08:20 on Mr. Dubé's request, since he wanted the first appointment of the day.

[16] Mr. Dubé's leave application was denied by Major Éric Lefrançois, his supervisor, who specified that Mr. Dubé's appointment must be outside of working hours (Exhibit F-8). Mr. Dubé had to account for his absence by using his sick leave credits.

[17] Mr. Dubé was surprised by the employer's negative response because he had been granted leave for the same purpose in the past, as had some of his colleagues. Major Lefrançois mentioned to him that the reason for his refusal was that those appointments had to be scheduled as much as possible outside of working hours. That issue had not been raised before.

[18] Mr. Dubé was not aware of the policy or of the content of the CPAO when he applied for leave. After his request was denied, he discussed it with the superintendent of the Mechanical and Electrical Workshop, Yves Larose.

[19] Mr. Piton has held a fire alarm and intrusion technician position at the Mechanical and Electrical Workshop, Engineering Unit, 5 Area Support Group, Valcartier Garrison, Department of National Defence, since 2001. On January 23, 2004, he applied for leave with pay for a routine medical appointment, which had been scheduled for the same day at 17:00 (Exhibit F-9). Mr. Larose denied that leave request on January 29, 2004 (Exhibit F-9) because it did not meet the conditions for that type

of leave. At the time that Mr. Piton's leave was denied, the foreman of the Mechanical and Electrical Workshop, Martin Bilodeau, asked him if he had tried scheduling the appointment outside of working hours. Mr. Piton replied that he had taken the first available appointment. Mr. Piton was surprised by the refusal because similar requests had been granted to other employees. Mr. Piton had to account for his absence by using his sick leave credits.

[20] After Mr. Dubé's grievance hearing, Lieutenant-Colonel Jean Bouchard notes the following in his response at the first level of the grievance process (Exhibit F-3):

> [Translation]
>
> . . .
>
> *2. At the hearing, you were asked to indicate what attempt you had made to schedule an appointment outside of working hours. You indicated that you had not made any such attempt and that your supervisors did not have the discretion to question you on that point.*
>
> . . .

[21] On March 18, 2004, in his response at the first level of Mr. Dubé's grievance process, LCol Bouchard stated that he "[translation] . . . had yet to determine whether Major Lefrançois had applied his discretion properly in accordance with the Departmental guidelines . . ." (Exhibit F-3). On March 18, 2004, in his response to Mr. Piton's grievance, he also reviewed the manner in which the supervisor had exercised his discretion (Exhibit F-6). Those responses show me that the manner in which the supervisors exercised their discretionary authority was reviewed at the first level of the grievance process for both of the grievances in this case.

[22] During the events underlying the grievances, Colonel Christian Rousseau held the position of commander of the Valcartier Garrison. As such, he heard the grievances at the second level of the grievance process and responded on April 7, 2004. He denied the grievances because it was his understanding that the CPAO is more restrictive than the policy. Thus, the grievors had to try to schedule appointments outside of working hours. Since they had admitted that they had not tried to schedule their appointments outside of working hours, he denied the grievances.

[23] According to Col Rousseau, the CPAO does not contradict the policy, which prevails, but rather complements it. The Department of National Defence cannot have policies that contradict those of the Treasury Board.

[24] On March 18, 2004, in his response at the first level of Mr. Dubé's grievance process, LCol Bouchard raised the fact that the length of leave requested seemed excessive considering the normal duration of a routine dental checkup (Exhibit F-3). In his testimony, Mr. Dubé explained that a three-hour leave seemed reasonable since he took into consideration the travel time required to get to the dentist's office and then to return to work, as well as the time that would be spent waiting at the dentist's office.

[25] There is no provision in the collective agreement for requests for leave for routine medical or dental appointments. Article 52 of the collective agreement deals with leave not covered elsewhere in the agreement. It is worded as follows (Exhibit F-2):

> ***LEAVE WITH OR WITHOUT PAY FOR OTHER REASONS***
>
> ***52.01*** *At its discretion, the Employer may grant:*
>
> . . .
>
> *b) leave with or without pay for purposes other than those specified in this Agreement.*
>
> . . .

[26] The policy, on the other hand, provides for the following (Exhibits F-1 and F-10):

> ***Leave With Pay Policy***
>
> ***Policy objective***
>
> *To provide for certain authorized paid absences.*
>
> ***Policy statement***
>
> *To allow for paid absences from work where such absences are occasioned by legal or societal obligations, or are deemed by the employer to be situations where the employee should not suffer a loss of income.*
>
> ***Application***
>
> *This policy applies to all departments and other portions of the Public Service listed in Part I of Schedule I of the* Public Service Staff Relations Act.

Policy requirements

Leave with pay must be authorized in accordance with the relevant authority, that is, the collective agreement or the appropriate terms and conditions of employment.

For the following leave situations:

. . .

– *medical and dental appointments;*

. . .

departments are to adhere to the standards and procedures set in Appendix A of this policy.

. . .

Appendix A- Procedures

. . .

Medical and dental appointments

It is the practice of the employer to grant leave for up to half a day for medical and dental appointments without charge to the employee's leave credits. This, however, applies only in the case of routine, periodic check-ups or an appointment related to a particular complaint.

Where a series of continuing appointments are necessary for treatment of a particular condition, absences are to be charged to sick leave.

. . .

[27] The CPAO (Exhibit F-10), for its part, states the following:

. . .

CPAO 6.29 OTHER LEAVE WITH OR WITHOUT PAY . . .

SECTION 1 - INTRODUCTION
PURPOSE

1. The purpose of this order is to outline the types of leave with or without pay (other than those specifically mentioned elsewhere in CPAOs) to which an employee is entitled. The order also describes the circumstances in which those types of leave may be granted.

RELEVANT AUTHORITIES

2. ''Relevant authority'' means whichever of the following authorities applies to the employee:

a. a collective agreement or arbitral award;

b. the Terms and Conditions of Employment for employees to whom a collective agreement does not apply.

POLICY

3. It is the policy of the Department to examine all requests for other leave with or without pay and to determine the merits of each case and the eligibility for leave in accordance with relevant authorities and guidelines issued by Treasury Board.

GENERAL

4. Collective agreements contain both general and specific clauses under the general heading ''Other Leave With or Without Pay''. Where there is a specific provision, it shall govern the circumstances under which leave is granted or denied. Where there is no specific provision, the granting or denying of leave shall be governed by the general clause in collective agreements entitled ''Leave With or Without Pay for Other Reasons.''

. . .

MANAGERIAL DISCRETION IN GRANTING LEAVE

10. Employees are entitled to some type of leave with or without pay, and it is mandatory for management to grant such leave if the employee satisfies the conditions described

in the relevant authority. Other types of leave with and without pay are granted at management's request. Discretionary leave requires varying degrees of managerial discretion, from limited to relatively unfettered, as indicated in the relevant authority. When deciding whether to grant a request for discretionary leave, management must exercise its discretion properly. For example, if management's discretion is limited to consideration of operational requirements only those requirements may be considered in the decision. Even when the relevant authority does not limit managerial discretion in any way, management is required to fully consider the leave request on its merits. The following points should be considered:

a. the purpose for which the leave is being requested and the attendant circumstances;

b. the impact of the employee's absence on work requirements and schedules;

c. the record of the employee making the request; and

d. departmental policies and guidelines.

SECTION 2 - TYPES OF LEAVE

. . .

LEAVE WITH OR WITHOUT PAY FOR OTHER REASONS

. . .

27. Usually the relevant authority provides for leave with or without pay for reasons other than those specified. This is a residual authority of management and may not be used when the circumstances giving rise to the request for leave are provided for in specific articles. Leave with or without pay may be granted for the following purposes not otherwise specified in the relevant authority:

. . .

TIME OFF WITH PAY

34. Time off with pay refers to the departmental practice of granting absence with pay for specific purposes, without charge against vacation, sick or other leave credits. On most occasions, time off with pay involves absences of less than four hours.

. . .

> ***TIME OFF WITH PAY FOR MEDICAL AND DENTAL APPOINTMENTS***
>
> *38. Time off with pay may be granted for periods of up to one-half day, at management's discretion, for medical and dental appointments relating to a specific complaint or periodic check-ups. If employees are unable to schedule appointments outside working hours, they are expected to make every reasonable effort to schedule such appointments as close as possible to the start or finish of their work day or meal period to minimize absence from work. Absences of one-half day or more are to be covered by sick leave, vacation leave, or leave without pay, at the option of the employee. Where subsequent absences are required for a series of appointments related to a particular condition, these absences are to be covered by sick leave, vacation leave, leave without pay or, for relatively short periods, by making up lost time.*
>
> . . .

IV. Summary of the arguments

A. For the grievors

[28] The grievors' counsel submitted that Col Rousseau had admitted that the Department of National Defence cannot contradict the policy through the CPAO. The policy provides that the employer is required to grant leave with pay when, in its opinion, the reason for the request is a situation where the employee should not suffer a loss of income (Exhibit F-10).

[29] The employer must apply the procedures set out in Appendix A of the policy, which provide that it is the "practice" of the employer to grant leave for up to a half day. The term "practice" implies a consistency in application, not an exception. The Federal Court of Appeal in *AVS Technologies Inc. v. Canadian Mechanical Reproduction Rights Agency,* [2000] F.C.J. No. 960 (C.A.) (QL), interpreted the term "ordinary" as meaning something that occurs regularly, normally or on average and that is not a function of quantity or frequency.

[30] The *Financial Administration Act*, R.S.C. 1985, c. F-11, gives the Treasury Board responsibility for human resources and the terms and conditions of employment for employees of the federal public administration (paragraph 7(1)(*e*)). Its subsection 11.1(1) gives it the authority to determine and regulate leave. The Treasury Board policy framework specifies that it must set minimum standards for human resources

and conditions of employment. The policy's purpose is to avoid arbitrary treatment of leave requests.

[31] Section 38 of the CPAO effectively transfers to employees the burden of proving that they meet the conditions under which such leave is granted, which is inconsistent with the policy.

[32] According to Donald J. M. Brown and David M. Beatty in collaboration with Christine E. Deacon in *Canadian Labour Arbitration*, 3rd Ed., Aurora (Ont.), Canada Law Book, 2006, an employer's exercise of its discretionary authority must be applied in a reasonable manner. The employer's decisions devolving from discretionary authority are subject to review by an adjudicator when they have an impact on working conditions. Under such circumstances, adjudicators have found that the provisions of the collective agreement are affected and that the reasoning underlying the employer's decision is reviewable on the grounds that it must not be discriminatory, arbitrary or in bad faith.

[33] The following decisions were cited by the grievors' counsel: *Langevin c. Québec (ministère du Travail)* (9 February 1999), 1271211, 1271235 et 1271243 (C.F.P. Qc); *Salois v. Treasury Board (Correctional Service of Canada)*, 2001 PSSRB 88; *Jonk v. Treasury Board (Foreign Affairs and International Trade)*, PSSRB File No. 166-02-28111 (19980424); *Ritz Carlton inc. c. Syndicat des travailleurs(euses) du Ritz Carlton*, [1987] T.A. 505 (Qc); and *Syndicat des cols bleus regroupés de Montréal, section local 301 – S.C.F.P. (Syndicat canadien de la fonction publique, section locale 2363) c. Dorval (Cité de)* (9 June 2006), 03-2004 (T.A.Q.).

B. <u>For the employer</u>

[34] According to the employer's counsel, article 52 of the collective agreement cannot apply to these grievances because a specific provision, article 36, sets out detailed conditions for sick leave. Medical and dental appointments are governed by article 36. Article 52 is a residual provision that cannot apply when there is a specific provision in the collective agreement. The principle of interpretation used by adjudicators is that a specific provision takes precedence over a residual provision.

[35] On these points, the employer submits the following decisions: *Clark v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-23892 (19940331); *Lévesque*

v. Canada Customs and Revenue Agency, 2005 PSLRB 154; and *McCarthy and Coleman v. Treasury Board (Canada Post)*, PSSRB File Nos. 166-02-1947 and 1948 (19750829).

[36] Alternatively, if the adjudicator finds that article 52 of the collective agreement applies, then the employer has exercised its discretion in a reasonable manner. The employer's discretionary authority enables it to verify whether the employee has made the necessary effort to schedule the appointment outside of working hours, as required under the CPAO. The employer is not required to grant leave based on article 52; its discretionary authority allows it to deny requests for leave.

[37] According to the employer's counsel, an employee must ask the employer which discretionary criteria it will base its decision on to approve or deny a request for leave.

C. Grievors' reply

[38] The inability of an employee to perform his or her duties underlies the entitlement to sick leave provided in article 36 of the collective agreement. In the absence of any disability, article 36 cannot apply. In this case, the grievors were able to perform their duties and therefore could not benefit from sick leave.

[39] The employer's refusal to grant leave is not reasonable under the circumstances of these grievances because it contradicted the policy. When the employer uses criteria under the CPAO to restrict access to leave, it is breaching rights that are recognized under the policy.

V. Reasons

[40] With respect to the preliminary objection raised by the employer, section 92 of the former *Act* determines which grievances may be referred to adjudication. In particular, those that concern a decision by the employer on the interpretation or application of a provision of the collective agreement related to an employee may be referred to adjudication.

[41] In this case, the employer's counsel submits that in their grievances, the grievors did not allege a violation of specific provisions of the collective agreement but rather that they contested the application of the policy and the CPAO. The employer's counsel specifies that the grievors amended their grievances when they were referred to adjudication, at which time they alleged a violation of article 52 of the collective agreement.

[42] For their part, the grievors submit that the employer knew the purpose and nature of the grievances and that they had discussed them throughout the grievance process. In their grievances, the grievors contest the employer's exercise of its discretionary authority whereby it denied them leave with pay for routine medical or dental appointments on grounds that were arbitrary, unfair or discriminatory.

[43] To render a decision on these two arguments, I must assess the nature and purpose of the grievances and determine whether they were known to the employer and discussed between the parties at the various levels of the grievance process. Mr. Piton wrote in his grievance that he contests the employer's refusal to grant him leave on January 23, 2004. He alleges that the decision is unfair and inequitable; the leave had been approved for other employees. He also alleges that the policy had not been followed. For his part, Mr. Dubé contests his employer's decision to deny him leave for a routine dental appointment. He alleges that that decision did not comply with article 1 of the collective agreement on its purpose and scope. The grievors allege that the employer's decision does not comply with the policy and that it gives priority to the CPAO.

[44] The collective agreement specifies in clause 52.01(b) that the employer may, at its discretion, grant leave with pay for purposes other than those specified in that agreement. There is no provision in the collective agreement that deals with leave for routine medical and dental appointments, so this type of leave must be considered as being for ". . . purposes other than those specified in . . ." the collective agreement.

[45] The policy specifies that the employer may grant, at its discretion, paid time off for up to a half day for routine medical or dental checkups (Appendix A of the policy). It also provides, in the paragraph entitled "Policy requirements," that this leave must be authorized in accordance with the collective agreement.

[46] The CPAO also addresses leave with pay for routine medical and dental appointments and refers to the collective agreement as a relevant authority. In exercising its management right, the employer must comply with four specific points (article 10 of the CPAO). Moreover, if the employee cannot get an appointment outside of working hours, he or she must try to get one as close as possible to the beginning or end of his or her workday or meal period (article 38 of the CPAO).

[47] There is no provision in the collective agreement stating that the policy or the CPAO form part of it. Even though the policy and the CPAO address the fact that the leave they cover must be authorized in accordance with the collective agreement, those two documents of the employer are not based on an agreement with the grievors' bargaining agent. Thus, the interpretation or application of the content of those documents with respect to the grievors is grievable under section 91 of the former *Act,* since it concerns some of their terms and conditions of employment.

[48] Subparagraph 91(1)*(a)*(i) of the former *Act* states the following:

> ***91.*** *(1) Where any employee feels aggrieved*
>
> *(*a*) by the interpretation or application, in respect of the employee, of:*
>
> *(i) a provision of a statute, or of a regulation, by-law, direction or other instrument made or issued by the employer, dealing with terms and conditions of employment,*
>
> . . .
>
> *in respect of which no administrative process for redress is provided in or under an Act of Parliament, the employee is entitled, subject to subsection (2), to present the grievance at each of the levels, up to and including the final level, in the grievance process provided for by this Act.*

[49] Normally, the grievors' grievances could not be referred to adjudication since they are not part of the wording of section 92 of the former *Act*. Thus, in the case of these grievances, I will not be able to determine whether the employer's interpretation or application, in respect of the grievors, of the provisions of the policy or of the CPAO was flawed.

[50] Paragraph 92(1)(*a*) of the former *Act* states:

> ***92.*** *(1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to*
>
> *(*a*) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award,*

[51] However, the courts have decided that an adjudicator can assess the employer's discretionary authority under the collective agreement when the employer has acted in a manner that is discriminatory, arbitrary or in bad faith. I must determine whether that is the case with these grievances.

[52] In his grievance, Mr. Piton clearly alleges that the employer treats him unfairly compared to other employees. He testified that requests similar to his had been granted for some of his colleagues. For his part, Mr. Dubé did not make a similar allegation in his grievance, but he testified that he had been granted leave with pay for routine medical appointments in the past, as had his colleagues. The grievors testified that they were not familiar with the CPAO at the time that they applied for sick leave.

[53] With respect to Mr. Piton's grievance, it is clear that the issue of unfair application of the employer's discretionary authority was presented to the employer through the grievance itself. With respect to Mr. Dubé's grievance, even if no such allegation was made in his grievance, the employer had agreed to review the issue of the proper exercise of management authority at the hearing into the first level of the grievance process, as reflected in the March 18, 2004 response (Exhibit F-3).

[54] The evidence shows that the employer addressed the issue of the reasonable exercise of its discretionary authority during the grievance process. In his response to Mr. Dubé at the first level of the grievance process, LCol Bouchard found that Major Lefrançois had exercised his discretionary authority in a reasonable manner (Exhibit F-3). In his response at the first level of the grievance process on Mr. Piton's grievance, LCol Bouchard found that Mr. Larose had exercised his discretionary authority in a reasonable manner (Exhibit F-6). The responses at the second and third levels of the grievance process do not address the manner in which the supervisors exercised their discretionary authority.

[55] Although the wording of Mr. Dubé's grievance does not indicate that the employer improperly exercised its discretionary authority, the employer agreed to address this issue at the first level of the grievance process. In so doing, the employer waived the right to claim that Mr. Dubé amended his grievance by adding, at the first level of the grievance process, that the employer had improperly exercised its discretionary authority. The employer did not oppose Mr. Dubé's testimony when he indicated that it had apparently previously granted him and his colleagues similar leave.

[56] The wording of Mr. Piton's grievance alleges that the employer exercised its discretionary authority unfairly and in a discriminatory manner. The response at the first level of the grievance process determines that the supervisor had properly exercised his discretionary authority.

[57] In both of these grievances, I find that the grievors had submitted to the employer, from the first level of the grievance process, that their supervisors had exercised their discretionary authority in an arbitrary manner by refusing to grant them the leave they requested. They referred grievances to adjudication whose purpose and nature were discussed during the grievance process. The grievances before me are no different from those to which the employer responded at the various levels of the grievance process.

[58] The grievors testified that the employer had previously approved requests for leave of the same nature for them and other employees. The employer did not contest that in its evidence at the hearing before me.

[59] Under the circumstances, it would appear that the employer apparently decided, at some unspecified moment, to change or apply the CPAO requirements. Unfortunately, it did not notify its employees, according to the grievors' uncontested testimonies. In fact, the grievors testified that at the time that they submitted their leave applications, they were not aware of the CPAO or of its obligations. On that point, I consider that it is the employer's responsibility to inform employees of the criteria it uses to assess requests for leave with pay for routine medical and dental checkups. On that point, I see that in the case of Mr. Piton, the employer denied the requested leave after his medical appointment (Exhibit F-9).

[60] Under the circumstances, I find that the employer exercised its discretionary authority in an arbitrary manner by failing to notify the grievors in advance of the criteria for approving leave with pay for routine medical and dental checkups and of the point at which it decided to apply these criteria.

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

(The Order appears on the next page)

VI. Order

[62] The grievances are allowed.

[63] I order the employer to reimburse to the grievors the sick leave credits that they had to use to cover their absences on January 23, 2004 in the case of Mr. Piton, and on March 9, 2004 in the case of Mr. Dubé, so that they could attend their respective medical and dental appointments.

July 20, 2007.

P.S.L.R.B. Translation

Léo-Paul Guindon,
adjudicator