Date: 20070816

File: 566-02-560

Citation: 2007 PSLRB 89

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

FRANÇOIS DEMERS

Grievor

and

DEPUTY HEAD
(Correctional Service of Canada)

Respondent

Indexed as
Demers v. Deputy Head (Correctional Service of Canada)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Michele A. Pineau, adjudicator

For the Grievor: Himself

For the Respondent: Adrian Bieniasiewicz, counsel

Heard at Sherbrooke, Quebec,
March 20 and 21, 2007.
(P.S.L.R.B. Translation)

I. Individual grievance referred to adjudication

[1] The grievor, François Demers, works as a correctional officer at the CX-01 level at Cowansville Institution. He is 51 years old and has been working for the Correctional Service of Canada (CSC) since 1977, that is, for 30 years. He works the night shift from 19:00 to 07:00 on a schedule of three days of work a week alternating with three days of leave. His work involves supervising inmates. He has been off work since December 8, 2005.

[2] On December 23, 2005, Mr. Demers presented a grievance alleging that the CSC had abused its authority (through discrimination and harassment) by prohibiting him from wearing a tie with his uniform and denying him access to Cowansville Institution as long as he refused to remove his tie. As corrective action, he asked that wearing a tie be optional, that he be reimbursed for all lost sums of money and that he be able to be present at all levels of the grievance process, at the CSC's expense. Mr. Demers was given a warning letter and fined $75 for not complying with the dress code.

II. Summary of the evidence

[3] In 2003, the CSC announced to correctional officers that there would be changes to the uniforms effective June 1, 2005. The new uniforms were designed in cooperation with the bargaining agent through a national joint committee and were approved by the CSC.

[4] Correctional officers are required to wear the uniform while on duty. The description of their uniform and the rules for wearing it are found in a CSC policy dated June 1, 2005, and entitled "Guidelines 351-1 – CSC Uniforms, Dress Code and Scale of Issue" (hereinafter "the dress code"), which was drafted by the CSC without the bargaining agent's involvement. Clothing items are issued using a point system. Each item corresponds to a numerical value determined on the basis of its price. When the uniforms were initially issued, each correctional officer had a certain number of points to be used for ordering the clothing items required by the dress code. Each officer also has a smaller number of yearly points for replacing uniform clothing items.

[5] From 2003 to 2005, a tender call was issued to find a supplier and the uniform clothing items were manufactured. The correctional officers were informed of the uniform change in three ways: they received an email on May 12, 2003, informing them of the changes; photographs of the new uniform were posted twice prior to June 2005

on a bulletin board in the control room to which all correctional officers had access; and each correctional officer received and countersigned a copy of the 25-page dress code. The dress code describes the new uniform in great detail, explains what is and is not allowed, and explains how to wear the uniform. It also provides for disciplinary action for non-compliance.

[6] Because of manufacturing delays, the uniforms ordered were not all ready by the target date of June 1, 2005. The correctional officers were therefore allowed to begin wearing the new uniform gradually. However, with a few exceptions, all the correctional officers received their clothing items during the fall of 2005. It was then that the CSC began cracking down on those who were not wearing the new uniform or who were wearing a combination of uniform and non-uniform clothing items. This was what led to the events that gave rise to this case.

[7] As a correctional officer with 28 years of service on the date the new uniform came into effect, Mr. Demers had always worn a tie at work. He wore a long-sleeved shirt both summer and winter so he could always wear a tie, since wearing a long-sleeved shirt meant that a tie had to be worn.

[8] With the new uniform, the tie has been replaced with a black T-shirt worn under the uniform shirt. The top two buttons of the shirt must be left open so the neckline of the T-shirt can be seen.

[9] It should be noted that there are two uniforms for correctional officers: the work uniform and the dress uniform, which is for official events only. A tie must be worn with the new dress uniform, as with the previous one.

[10] Mr. Demers receives his new uniform on August 29, 2005, but continued wearing the old one for three reasons: none of the correctional officers were wearing the complete new uniform yet; one of the supervisors was not wearing it because his specially made uniform was adapted to his physical characteristics; and a tie could not be worn with the new uniform. Mr. Demers states that he would wear the new uniform as soon as the other correctional officers wore it. During his testimony, Mr. Demers admits that his refusal to wear the new uniform was also a way of expressing his discontent over the fact that the collective agreement had not yet been renewed despite three years of collective bargaining.

[11] On October 28, 2005, Mr. Demers was ordered to wear his new uniform in a memorandum signed by his immediate supervisor, Pierre Sansoucy, after several supervisors reported that he was not wearing it. Mr. Demers complies with that order, while wearing the tie from his former uniform. He is reminded several times that wearing a tie was not allowed, and the supervisors ask him to take it off. He continues to wear it. The reminders are given to him in front of his co-workers.

[12] On November 29, 2005, Mr. Sansoucy meets with Mr. Demers and orders him to remove the tie he was wearing with the new uniform. Mr. Demers explains that the tie represents to him the level of respect he had from the inmates he supervises. Mr. Sansoucy responds that, while he understands why Mr. Demers wants to wear a tie, he cannot approve his action in continuing to do so. Mr. Demers says that he is prepared to incur disciplinary penalties in order to assert his rights. The meeting is recorded in a memorandum warning Mr. Demers that he would be liable for a disciplinary penalty if he did not comply with the dress code. For his next shift, Mr. Demers comes to work wearing the tie.

[13] On December 2, 2005, supervisor Bernard Desrosiers informs Mr. Sansoucy by email that Mr. Demers is still wearing the tie and that it is becoming difficult to manage the situation. The same evening, Mr. Demers states that he is unable to work because of the dispute. In a second email a few hours later, Mr. Desrosiers explains that Mr. Demers "[translation] …lost it, but he has come around." Since Mr. Desrosiers was able to calm Mr. Demers down, Mr. Demers worked his shift. On December 4, 2005, supervisor Michel Gagnon informs Mr. Desrosiers by email that Mr. Demers had been warned about his tie.

[14] On December 5, 2005, at 08:00, at the end of the night shift, Mr. Sansoucy, accompanied by a manager from Cowansville Institution, meets with Mr. Demers and representatives of his bargaining agent to take stock of the situation. At the meeting, Mr. Sansoucy explains that a penalty would be imposed on Mr. Demers if he continued to wear a tie. Mr. Demers responds that he would see this process through to the very end. He then receives a written reprimand before leaving Cowansville Institution, which he did not contest.

[15] According to the testimony given by Mr. Demers, the CSC managers made malicious and humiliating remarks about his tie during the December 5, 2005,

meeting. In his testimony, Mr. Sansoucy did not admit that the meeting was in any way related to the events behind the grievance. Mr. Demers left the meeting saying that war had been declared.

[16] On December 8, 2005, at the start of his shift, Mr. Sansoucy meets with Mr. Demers again in the presence of his union representative to discuss the wearing of the tie. During that meeting, Mr. Sansoucy orders him to remove his tie and not to wear it at work. Mr. Demers refuses. Disciplinary action was taken against him for the second time, in the form of a $75 fine, which is the subject of the present grievance. The meeting is recorded in a memorandum dated December 9, 2007, which was eventually given to Mr. Demers.

[17] Following his meeting with Mr. Sansoucy on December 8, 2005, Mr. Demers leaves Cowansville Institution visibly shaken and in tears. His condition is recorded in a supervisor's observation report, but there does not appear to have been any follow-up on the situation. After leaving the institution, Mr. Demers goes to the hospital. He is seen by an emergency doctor, who put him on leave from work due to an interpersonal crisis / adjustment crisis situation.

[18] On December 13, 2005, Mr. Demers submits an industrial accident claim to Quebec's Commission de la santé et de la sécurité du travail (CSST). On December 21, 2005, the CSC informs him that he would be without pay as of December 23, 2005. The legislative provisions concerning industrial accidents require an employer to pay for the first 14 days following such an accident, but employees must use their sick leave credits beyond that period. Since Mr. Demers has no more credits, he is to be on leave without pay until the CSST decides his claim.

[19] On December 26, 2005, Mr. Demers reports for work. The CSC sends him home because he could not submit a medical certificate stating that he was fit to work, although he says that he feels good and is no longer suffering from an industrial accident.

[20] On January 3, 2006, the CSC replies to the industrial accident claim as follows:

[Translation]

. . .

> *François Demers' supervisor has met with him four times in recent weeks with regard to misconduct at work. Thus, on 2005/11/10, P. Sansoucy met with him informally to make him aware of the dress code. On 2005/11/29, his supervisor met with him again to tell him to comply. On 2005/12/05, a first disciplinary action was taken against him because he was not complying with the dress code. On 2005/12/08, a second disciplinary action was taken because he was not complying. It was after that meeting that he felt ill and left the institution.*

. . .

[Emphasis added]

[21] Since being fined on December 8, 2005, Mr. Demers has been under the care of a physician, whom he sees about every six weeks. Based on the emergency doctor's recommendation, the physician puts Mr. Demers on leave from work for three months starting on December 8, 2005. The physician diagnoses him with a situational adjustment disorder. Following a consultation on April 3, 2006, Mr. Demers' physician extends the leave by two months. This time, the diagnosis specifies that the situational adjustment disorder was accompanied by depression. During an appointment on June 9, 2006, Mr. Demers' physician extends the leave for a period of two to four months based on the same diagnosis.

[22] On January 17, 2006, Mr. Demers, through his counsel, asks the CSC to reconsider its position on the wearing of a tie at work. On January 25, 2006, the CSC replies to that request by stating that the uniform had been chosen by the national joint committee, that it is mandatory and that Mr. Demers must comply. The CSC adds that, before he could return to work, Mr. Demers would have to provide a certificate from his physician stating that he was fit to resume working.

[23] On February 13, 2006, at the CSC's request, Mr. Demers undergoes a psychiatric assessment at the Medisys clinic. The assessment report confirms that he has no functional limitations or permanent medical impairment and that his condition had consolidated as of February 13, 2006. The psychiatrist declares him fit to return to work, noting that he "[translation] . . . is still troubled by the employer's intransigence and its decision to apply a rule he does not understand."

[24] On March 1, 2006, the CSST denies Mr. Demers' industrial accident claim. An application for review of that decision is currently before Quebec's Commission des lésions professionnelles.

[25] On March 6, 2006, the CSC writes to Mr. Demers following the psychiatric assessment of February 13, 2006, and the CSST's decision and asks him to come to work on March 15, 2006, during the day shift, and to confirm to Mr. Sansoucy that he would come to work on that date.

[26] On March 7, 2006, Mr. Demers has a telephone conversation with Mr. Sansoucy. He explains that he had already planned a vacation starting on March 15, 2006, and that he would return to work after his vacation. Mr. Sansoucy informs him that he does not have the necessary leave credits to take more than 36 hours of vacation and that he would have to "[translation]…bring in a medical paper" to justify any additional absence. Mr. Sansoucy informs him that his industrial accident claim has been denied by the CSST and that he would have to take steps to repay the 14 days of salary he had been paid after filing his claim. In reply to a question by Mr. Demers, Mr. Sansoucy says that he would have to come to work without a tie or else face disciplinary action. Mr. Demers refuses to give him a specific date on which he would return to work. In his testimony, Mr. Demers states that this conversation had caused him enormous stress.

[27] Mr. Demers did not return to work.

[28] On July 10, 2006, due to Mr. Demers' prolonged absence, the CSC requests that he undergo a second psychiatric assessment with the same psychiatrist who had assessed him on February 13, 2006. Based on his second assessment, the psychiatrist changed his opinion. His comments relevant to this case are as follows:

> [Translation]
>
> . . .
>
> 1. *In my opinion, the current diagnosis is severe major depression.*
>
>   *It must be understood that Mr. Demers is, in my view, trying desperately to protect himself psychologically from the emergence of a depression that would lead to a significant deterioration in his personality and the disintegration of his self-image. This is why I believe*

that he has developed a delusional psychotic fixation on wearing his tie. As he says himself, if his tie is taken away, this changes his entire character and he has the impression that he is going to die on the spot.

To the extent that he can continue wearing the tie and believing that it is essential to him, he can thus prevent psychotic disintegration.

2. *I believe that the condition is in fact progressive at this time. The more his employer confronts him with the idea of not wearing his tie, the more anxious he becomes, and his disintegration anxiety leads to the solidification and rigidity of the psychotic defence.*

   In this context, I consider the prognosis very bad, and it is my view that Mr. Demers will be unable to return to his job if he is not allowed to wear a tie.

3. *As I stated above, since he cannot wear his tie in the workplace, I find him completely unfit to return to work.*

4. *In my opinion, there is a permanent employment limitation, namely that he cannot work without wearing his tie.*

5. *I think that the only thing the employer could do to help him be reinstated in his job and reduce his mental suffering is to allow him to wear his tie.*

. . .

[29] On October 6, 2006, Mr. Sansoucy calls Mr. Demers at home to tell him that he had been found unfit to work and that the CSC now has to make a decision on his case. Because of this remark, which he found inappropriate, Mr. Demers went in a distressed state to the emergency room at the hospital, where he was kept overnight. On October 15, 2006, during a meeting with the management of Cowansville Institution, a labour relations representative and a union representative, Mr. Demers realizes that an attempt was being made to fire him. The CSC asks him to sign documents so he can retire for health reasons. Upset by this very final nature of the meeting, he asks the CSC not to contact him anymore and to deal with him through his counsel from then on.

[30] Further to a request from Mr. Demers, the administrator of the Public Service Disability Insurance Plan agrees on December 14, 2006 to pay him benefits retroactive

to March 10, 2006. At the time of the hearing, Mr. Demers was still receiving disability insurance benefits, which were to last for two years.

[31] Mr. Demers testifies that he had made inquiries with employers of police forces, firefighters and other correctional officers and learned that ties are usually optional.

[32] Some other facts relevant to this case are as follows. Between November 15 and December 4, 2005, some correctional officers supported Mr. Demers' actions by wearing ties with their uniforms as well. They were warned to remove the ties (in the case of one officer, several times), and they eventually complied. None of them were disciplined.

[33] In November 2005, several correctional officers begin wearing tuques, scarves and crewneck sweaters at work, even though they were not part of the uniform. The CSC accepts their justification for wearing these non-uniform clothing items, namely that it was more convenient during searches to wear a tuque, which stays on their heads, rather than the uniform hat — the forage cap — which falls off. However, no evidence was provided about the convenience of the scarf. The CSC accepts this change in the uniform, but a service bulletin dated December 22, 2005, stated that tuques, scarves and crewneck sweaters would be tolerated provided that they met certain standards and were paid for by the correctional officers who wore them.

[34] Along the same lines, another service bulletin dated September 7, 2005, had already allowed other non-uniform clothing items to be worn based on a certain protocol, namely the pin of the National Association of Federal Correctional Officers and the peace officers memorial ribbon.

[35] Between June 23, 2005, and March 23, 2006, the CSC keeps a record of dress code violations, showing the names of correctional officers, some of whom were given more than one warning. However, Mr. Demers was the only correctional officer given a disciplinary penalty for not complying with the dress code.

[36] Mr. Sansoucy, Mr. Demers' immediate supervisor, testified that Mr. Demers was always attired in a neat and clean manner and that he always complied with the dress code, except since the most recent change. Mr. Demers asked him for a copy of the policy that prohibited wearing a tie. Mr. Sansoucy referred him to the dress code. However, the code says nothing about this.

[37] Mr. Demers came to the hearing wearing the new uniform with the tie from the previous uniform. On cross-examination, Mr. Sansoucy testifies that the tie worn by Mr. Demers at the hearing is now used with the dress uniform. Mr. Sansoucy admits that, on December 8, 2005, the date of the second disciplinary meeting, Mr. Demers was wearing a mix of the former uniform (sweater and coat) and the new uniform (pants and shirt) because the coat that was part of the new uniform was not ready. He also admits that other correctional officers wore non-uniform coats beyond that period while waiting for the new uniform coats to be made. Those correctional officers were apparently under the impression that the new uniform coat was completely different from the former one, which they got rid of, when in fact the only change was in the crests and epaulettes.

[38] Mr. Sansoucy explains that the uniform evolves over time. Correctional officers suggest changes, and the national joint committee then makes its recommendations to the CSC. According to Mr. Sansoucy, Mr. Demers did not use the appropriate procedure to request that wearing a tie be optional. As a result, Mr. Sansoucy could not allow him to wear a tie in fall 2005. However, he acknowledges that, if he were authorized to do so, he would allow Mr. Demers to wear a tie.

[39] According to Mr. Sansoucy, the uniform is a matter of occupational health and safety and ensures that employees are able to come to work. He does not have the authority to make exceptions to the dress code. His work involves ensuring that correctional officers are able to do their work or referring them to assistance programs.

III. Summary of the arguments

A. For Mr. Demers

[40] Mr. Demers argues that, when he saw the first photographs and explanations of the new uniform, he did not realize that it no longer included a tie. He has since learned that wearing a tie is usually optional for similar trades.

[41] Moreover, Mr. Demers does not understand why wearing a tie became prohibited overnight when it had been mandatory for the 28 years of his career. He submits that the new uniform was not voted on by the correctional officers, and that no local consultations were held. If this had occurred, he would have challenged the fact that the new uniform did not allow a tie to be worn, at least as an option. He did

not expect a strict prohibition on wearing a tie. In his opinion, the tie that is still worn with the dress uniform should be allowed at work. He explained that, at the time the fine was imposed on him, he was allowed to wear all his "[translation] old things,' like sweaters, coats and other accessories, but not his tie. Mr. Demers has an entire collection of old ties that he can wear even if he cannot order any new ones. I note that the dress code does not prohibit wearing a tie.

[42] It was only after he was fined, during a conversation in March or April 2006, that Mr. Sansoucy told Mr. Demers he had to ask the bargaining agent to have the uniform changed. The bargaining agent did not want to support his efforts. His president laughed in his face when he requested that ties be made optional. In early June 2006, Mr. Demers received a call from the bargaining agent asking him "[translation] to drop this tie business," an incident that caused him a moment of extreme distress.

[43] Mr. Demers submits that he was not present for the hearing of his grievance at the various levels of the grievance process. During the meeting at the second level, the CSC denied him access to Cowansville Institution and required that all communication occur by telephone. Mr. Demers refused to accept that arrangement and was therefore unable to present his views. There was no meeting or reply at the third level of the grievance process.

[44] Mr. Demers argues that, as he sees it, the tie is a work tool that allows him to gain the respect of the inmates with whom he deals. It is also an important characteristic of him as a person. He has difficulty understanding why he was suddenly asked to change his image even though that image had been imposed on him for more than 28 years. He accuses the CSC of being insensitive to his need to wear a tie. He notes that he was ordered to remove his tie several times in front of his co-workers, without regard for his reasons for refusing to remove it. He argues that the CSC's no-tie policy is not only unreasonable but unjustified, since he does not deal with the public and works at night.

[45] Mr. Demers argues that the CSC exerted undue pressure on him to remove his tie. On December 8, 2005, he simply fell apart. He did not think that the dispute with his supervisor over the wearing of the uniform would come down to an ultimatum. He was in a state of intense psychological distress when he arrived at the hospital

emergency room. He alleges that he was harassed by the CSC, which saw this incident as a way of getting rid of him. He challenges the fact that the CSC went so far as to deny him access to Cowansville Institution in the absence of a medical certificate, even though he said he was fit to work. He alleges that this merely aggravated the situation by making him sicker. This is why, on his physician's recommendation, he did not return to work.

[46] Mr. Demers explains that the vacation he took in March had been planned with his spouse for a long time. At the time, he thought he had enough leave credits to cover nearly all the vacation days he planned to take. However, he had an appointment with his physician to reassess his condition as soon as he returned. Contrary to the results of the first psychiatric assessment conducted at the CSC's request, his own physician ordered him not to go to work for a few more months. It was, therefore, at that point that he applied for disability insurance benefits.

[47] Mr. Demers submits that, because of the CSC's intransigence and its decision to offer him a medical retirement, he is no longer motivated to work, his health has suffered and his spouse has left him. He feels devalued by all of this. He has the impression that he has ruined everything that was important to him.

[48] In his grievance, Mr. Demers requests the following corrective actions: 1) that the dress code be changed to allow ties to be worn; 2) that he be reimbursed for all lost sums of money; and 3) that he be able to be present at all levels of the grievance process, at the CSC's expense.

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

[49] The respondent objects to my jurisdiction to decide this case because of the provisions of paragraph 209(1)(*a*) of the *Public Service Labour Relations Act* ("the new *Act*"), enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22. That paragraph provides that only an individual grievance related to the interpretation or application of the collective agreement may be referred to adjudication. The respondent argues that the dress code is not part of the collective agreement and that I therefore cannot order that it be changed to allow ties to be worn. The respondent also argues that Mr. Demers' grievance is based on the dress code rather than on disciplinary action within the meaning of paragraph 209(1)(*b*) of the new *Act*.

[50] The respondent denies that the CSC refused to allow Mr. Demers to have access to Cowansville Institution for disciplinary reasons. Rather, it submits that it did so for health reasons.

[51] The respondent argues that the $75 fine is not part of the grievance because it was not clearly mentioned in the requested corrective action or dealt with in the decisions made on the grievance. The respondent further argues that taking account of the fine would change the nature of the grievance, which is prohibited by *Burchill v. Canada (Attorney General)*, [1981] 1 F.C. 109 (C.A.). The respondent asks me to dismiss the grievance without considering it on the merits. I have taken this objection under advisement. The respondent made the following submissions on the merits of the grievance.

[52] The respondent argues that the changes to the dress code were made after extensive consultations between the CSC and the bargaining agent on the national joint committee, which had the mandate to propose a new uniform. The CSC and the bargaining agent had an opportunity to make their comments, and they ultimately reached an agreement. Since the uniform was supported by the bargaining agent and, in particular, its president, it cannot be considered arbitrary, unreasonable or in violation of the collective agreement.

[53] The uniform was announced two years before it came into effect in 2005. The coming into effect of the new uniform was not a surprise to anyone, since all the correctional officers received a copy of the dress code.

[54] The tie was removed because, according to certain correctional officers, it was in the way when searching the washrooms. The bargaining agent proposed that it be removed from the work uniform, while being kept for the dress uniform. The two uniforms have different uses and must not be confused. Only two correctional officers at Cowansville Institution have a dress uniform, and Mr. Demers has never had one.

[55] If I find that the $75 fine is part of the grievance, the respondent argues that it was justified. When Mr. Demers received his uniform on August 29, 2005, he refused to wear it. Paragraph 10 of the dress code states that the CSC may take corrective or disciplinary action for any violation. The dress code provides that no non-uniform clothing item may be worn with a uniform item unless an exception is authorized. Since a tie is not part of the new dress code, it was not authorized for Mr. Demers.

[56] Moreover, Mr. Demers was warned several times not to wear a tie. He continued to refuse to take it off and to comply with the dress code, even after a first written warning. The respondent argues that Mr. Demers' actions amounted to insubordination. To comply with the dress code, the CSC had no choice but to impose progressive discipline on Mr. Demers. However, the other correctional officers who did not wear the uniform had reasons for not doing so. There were some uniforms returned — uniforms that were not the right size or uniforms that had to be made to measure. Eventually, everyone was wearing the uniform. The other correctional officers who wore a tie agreed to comply with the new requirements by taking it off. In this regard, the CSC made no exceptions. However, the scarves and tuques were authorized on December 22, 2005, after changes were proposed by the national joint committee.

[57] The respondent argues that the $75 fine was justified in the circumstances because it was preceded by a written warning. That warning was not grieved.

[58] The respondent argues that the CSC acted properly in denying Mr. Demers access to Cowansville Institution after December 8, 2005. The CSC had a medical certificate stating that Mr. Demers was off work for two months. The CSC was, therefore, entitled to require him to submit a medical certificate stating that he was fit to work, so it would not run the risk of another incident. Since Mr. Demers was not fit to work, the CSC was justified in denying him access to Cowansville Institution. Moreover, when he was declared fit to work by the psychiatrist, Mr. Demers submitted a medical certificate stating that he was not fit to work. This contradiction once against justified the CSC's decision to deny him access to Cowansville Institution.

[59] In support of its argument that the disciplinary penalty was well founded, the respondent submitted the following decisions: *Arnfinson v. Treasury Board (Revenue Canada, Customs and Excise)*, PSSRB File No. 166-02-10375 (19820125); *Massé v. Treasury Board (National Defence),* PSSRB File No. 166-02-15361 (19860612); *Guimond v. Treasury Board (Department of National Defence)*, PSSRB File No. 166-02-18384 (19890710); and *Demers v. Treasury Board (Solicitor General — Correctional Service),* PSSRB File No. 166-02-20093 (19901221).

[60] In support of its argument that it was justified in denying Mr. Demers access to Cowansville Institution without a medical certificate indicating that he was fit to work, the respondent submitted an extract from Brown and Beatty, *Canadian Labour*

Arbitration, 4th ed., at para 7:6142, "Medical examinations and opinions," as well as the following decisions: *Stinson v. Treasury Board (Department of National Defence),* PSSRB File No. 166-02-15745 (19890313); *Lorrain v. Treasury Board (Solicitor General of Canada),* PSSRB File No. 166-02-14709 (19850718); and *Ricafort v. Treasury Board (Department of National Defence),* PSSRB File No. 166-02-17422 (19881129).

[61] The respondent therefore asks me to dismiss the grievance.

C. Mr. Demers' reply

[62] Mr. Demers replies that he is not disputing the fact that he was notified of the coming into effect of the dress code and its requirements. However, he submits that the CSC molded an image for him for 28 years and then changed it overnight for no serious reason. He argues that he will be sick as long as the CSC remains intransigent. Its actions have had a serious negative effect on his physical and mental health, and this is why he is off work. The CSC abused its authority and then excluded Mr. Demers from the place where he had spent his entire career.

IV. Reasons

A. My jurisdiction over the subject matter of the grievance

[63] Mr. Demers' individual grievance is worded as follows:

> [Translation]
>
> . . .
>
> ***Description of the grievance:***
>
> *Abuse of authority by the employer leading to discrimination and harassment, all because of a tie.*
>
> *I am being prohibited from earning a living, since I no longer have access to the institution.*
>
> *Corrective action requested:*
>
> 1. *Make wearing a tie optional in the dress code.*
> 2. *Reimburse me for all lost sums of money.*
> 3. *Be present at all levels at the employer's expense.*
>
> . . .

[64] Section 209 of the new *Act* sets out, *inter alia*, the conditions for referring an individual grievance to adjudication:

> ***209.*** (*1*) *An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to*
>
> (a) *the interpretation or application in respect of the employee of a provision of a collective agreement . . .* ;
>
> (b) *a disciplinary action resulting in termination, demotion, suspension or financial penalty;*
>
> . . .
>
> *(2) Before referring an individual grievance related to matters referred to in paragraph (1)*(a)*, the employee must obtain the approval of his or her bargaining agent to represent him or her in the adjudication proceedings.*
>
> . . .

[65] The respondent argues that I have no jurisdiction to decide this grievance because the dress code is not part of the collective agreement. However, paragraph 4 of the dress code refers to several authorities, including the following one relied on by the CSC: the *Uniforms Directive* of the National Joint Council (hereinafter "the *Uniforms Directive*").

[66] The *Uniforms Directive*, which is part of the collective agreement (clause 41.03(a)), provides as follows:

> . . .
>
> ***General***
>
> ***Collective agreement***
>
> *This directive is deemed to be part of collective agreements between the parties to the National Joint Council (NJC), and employees are to be afforded ready access to this directive.*
>
> ***Grievance procedure***
>
> *In cases of alleged misinterpretation or misapplication arising out of this directive, the grievance procedure, for all represented employees within the meaning of the Public*

> *Service Labour Relations Act, will be in accordance with Section 7.0 of the National Joint Council By Laws. . . .*
>
> . . .

[67] The respondent has provided me with uncontradicted evidence that the uniform was developed in cooperation with the bargaining agent. However, the 25-page dress code distributed on June 1, 2005, goes far beyond the description of the uniform approved by the bargaining agent. It is, in fact, a complete dress code containing specific instructions on issuing clothing, exceptions, special clothing items, and disciplinary action for non-compliance. Accordingly, absent any evidence that the entire dress code was approved by the bargaining agent, the consequences of its application to correctional officers must be assessed in the same way as any other rule imposed unilaterally by an employer. For this reason, I conclude that the dress code is not part of the collective agreement. However, because of the provisions of paragraph 209(1)(*b*) of the new *Act*, insofar as the grievance is related to disciplinary action resulting in a financial penalty, I can make a decision on this question and any other corrective action consistent with my findings.

[68] In its arguments, the respondent distinguishes between a fine imposed for not complying with the dress code, a point over which it claims I have no jurisdiction, and disciplinary action over which I do have jurisdiction. I find this distinction unfounded. First of all, the respondent did not cite any authority or legislative provision stating that a fine can be distinguished based on whether it is administrative or disciplinary. Whatever the reason it is imposed, a fine is a financial penalty and is predicated on wrongdoing. Throughout this case, the respondent itself has characterized Mr. Demers' behaviour as insubordination that warranted a disciplinary approach. This is reflected in the following documents: the disciplinary report form dated December 5, 2005 (Exhibit P-21); Mr. Sansoucy's memorandum to Mr. Demers dated December 9, 2005 (Exhibit P-22); the disciplinary report form dated December 8, 2005 (Exhibit P-23); the record of dress code violations for the period from June 23, 2005, to March 23, 2006 (Exhibit P-24); and the CSC's reply to Mr. Demers' industrial accident claim, which alleged that Mr. Demers' occupational disease was attributable to the disciplinary action imposed on him (Exhibit P-26).

[69] The respondent also argues that I have no jurisdiction to reverse the $75 fine, because this corrective action was not clearly mentioned in the grievance or dealt with

in the decisions made on the grievance. The respondent submits that taking account of the fine would change the nature of the grievance. I disagree. The corrective action sought by Mr. Demers is the reimbursement of "[translation] . . . all lost sums of money . . . ," which is general enough to include a sum of money lost through a fine. The idea that the CSC can avoid the consequences of a grievance by ignoring the facts behind the grievance in its decisions is a strange submission that is distinctly original but unfounded.

[70] I therefore find that I have jurisdiction to deal with the $75 financial penalty and the consequences of that penalty.

B. The dress code and the taking of disciplinary action

1. Arbitral jurisprudence

[71] There is extensive arbitral jurisprudence dealing with the imposition of dress requirements at work. In the following analysis, it should be noted that the approach taken in decisions made under the former *Public Service Staff Relations Act* ("the former *Act*"), R.S.C. , 1985, c. P-35, and the new *Act* with regard to the imposition of dress requirements on public service employees differs from the approach taken in private sector decisions on the same question. In short, decisions made under the former *Act* and the new *Act* consider a refusal to comply with dress requirements to be an issue of insubordination. However, Mr. Demers' response to the financial penalty imposed by the CSC for insubordination is to raise the issue of the reasonableness of imposing the dress code on him. Private sector decisions have dealt at length with the reasonableness of dress requirements and an employee's duty to comply with those requirements. For this reason, I have chosen to look at arbitral jurisprudence from the private sector in addition to the public sector cases cited by the respondent.

[72] Let us begin by looking at the adjudication decisions cited by the respondent in support of its arguments.

[73] In *Arnfinson*, a customs inspector was suspended for one day for wearing a non-issue parka with departmental insignia attached. The inspector had had the parka made, and it was of better quality than the one provided by the employer. He insisted on wearing it despite warnings from his supervisors and the replies received during union-management consultations. The adjudicator held that the disciplinary penalty

was reasonable because the inspector had said he was prepared to flout the employer's authority to require him to wear a uniform, and because he believed that he could be subjected to no more than a reprimand letter, the least severe disciplinary penalty.

[74] In *Massé*, a tradesman helper at a Canadian Armed Forces base was given a half-day suspension for not wearing his safety helmet while at work after being warned to wear it and being given a disciplinary penalty, namely a written reprimand. The tradesman helper admitted that he had taken off his helmet on the work site because it was warm. The adjudicator upheld the disciplinary penalty.

[75] In *Guimond*, a kitchen helper employed by the Department of National Defence was suspended for three days for refusing twice to wear a hat with his hair net. His excuse in the first case was that he was not handling food, and in the second case that he had been given only a directive but that he needed an "order" because he was working on a military base. The adjudicator upheld the disciplinary penalty because he considered the kitchen helper's excuses unreasonable and because the kitchen helper had a disciplinary record.

[76] *Demers* involved the same employee as in this case. In that case, he refused to lower a braid in his hair, which prevented him from wearing the uniform cap. He was suspended for two days, one with pay and one without pay. However, the employer had tolerated that hairstyle for a long time and had not punished him until the very morning it initially suspended him. The suspension was replaced with a reprimand letter because the employee had not been given any warning during the entire period that he wore the braid and because he had no prior disciplinary record.

[77] On the other hand, arbitral jurisprudence in the private sector draws a distinction between two types of requirements for appearance at work: personal appearance and dress. The reasonableness of the employer's requirements is judged more strictly if they affect personal appearance — beard, mustache, long hair and piercings — since they have a continuous effect outside work. Dress requirements are applied more rigorously because their consequences are felt only at work and employees are free to wear what they want before and after work. However, the jurisprudence has adjusted these guidelines based on the circumstances of each case.

[78] The criteria for judging rules imposed unilaterally by an employer were summarized in *Lumber & Sawmill Workers' Union, Local 2537 v. KVP Co. Ltd.* (1965),

16 L.A.C. 73. These criteria have since been endorsed by adjudicators. As I have already said, I consider the dress code in this case a unilateral CSC rule.

[79] According to *Lumber & Sawmill Workers' Union*, any unilateral rule imposed by an employer: 1) must not be inconsistent with the collective agreement; 2) must be reasonable; 3) must be clear and unequivocal; 4) must be brought to the attention of the employee, with 5) the employee being notified that a breach of such rule could result in a disciplinary penalty; and 6) should have been consistently enforced by the company from the time it was introduced. The application of these criteria will be analyzed a little later.

[80] The following arbitral jurisprudence draws certain distinctions between personal appearance rules and dress rules, but the general principles intersect to some extent, despite certain differences based on the situation. Since this jurisprudence has evolved as customs have changed, it is analyzed in chronological order.

[81] In *International Association of Fire Fighters, Local 626 v. Scarborough (Borough)* (1972), 24 L.A.C. 78, the employer had ordered a firefighter to shave his sideburns to comply with one of its appearance rules. The adjudicator allowed the grievance on the ground that there was no business justification for such an appearance rule, since firefighters wear clothing and a mask that cover them completely when they have to put out fires. The general principles applied by the adjudicator to appearance or dress rules are as follows:

. . .

> *Initially, I am of the view that the gist of the employment relationship in its unsophisticated form is that the employee is expected to perform a day's work and the employer is required to give him a day's pay for that work. The nature of the industry, the type of employer and the collective agreement may impose certain other expectations and requirements. But, prima facie, as along as the employee performs the job or the work for which he has been hired the employer has no authority to impose his personal views of appearance or dress upon the employee. There is no absolute right in an employer to create an employee in his own image.*
>
> *There are exceptions to that general proposition. The first exception concerns the matter of health and safety. . . .*
>
> *The second exception involves the legitimate business interest of the employer. . . . [A]n employee should only be subjected*

> *to the imposition of such standards not on speculation, but on the basis of legitimate and cogent business reasons which objectively demonstrate that an employee's dress or appearance are affecting his work performance or are adversely affecting the employer's business. . . .*
>
> . . .

The adjudicator also discussed the importance of the dress code to the employer's reputation as a measure of its reasonableness:

> . . .
>
> "*Image" is an intangible concept about which there is much debate; it is an elusive matter held in high repute by some and looked at with considerable cynicism by others. The matter of image is a legitimate business interest under which a company may act, but again a board of arbitration should not act on a simple subjective view of what an employer conceives to be his image, because the matter of image is no longer a question of individual opinion. Modern social science has enabled the measurement of image by objective evidence, and as I have indicated it would be preferable if parties would submit such evidence at an arbitration. . . .*
>
> . . .

[82] *Dominion Stores Ltd. v. United Steelworkers of America* (1976), 11 L.A.C. (2d) 401, is authoritative as to the reasonableness of an appearance rule. The adjudicator in that case set out the criteria considered to be helpful in determining whether an appearance rule imposed by an employer is reasonable:

> . . .
>
> *First, all the cases are in agreement that a company may promulgate rules concerning the dress and appearance of employees provided that the rules are reasonable. Secondly, arbitrators recognize that there is an ingredient of personal freedom involved in this type of issue and since the rules concerning "hair" are such that they also affect the employees' off-duty hours, arbitrators have been careful to balance the employees' personal rights against the legitimate interests of the employer. Although the personal freedom of an employee is a concern it is not absolute. Thirdly, the legitimate concerns of the employer involve both image and actual loss of business and those two concepts are obviously interrelated. Permeating all the cases is the suggestion that an employer must demonstrate that the grievor's*

> *appearance has resulted in a threat to its image and consequent financial loss or at the very least that on the balance of probabilities the employee's appearance threatens its image and therefore threatens a loss in business to the company . . . Fourthly, many arbitrators have alluded to the "changing standards" or "marked shift in public attitudes" or to evolving hair styles and I too am of the opinion based on the references in the cases and my own personal observations that it is appropriate for me to take official notice that in the community there is an evolving standard of dress and hair styles and that the community has grown more tolerant in its attitudes . . . Fifthly, the cases have distinguished industries where the employees come in contact with the public and those where there is no public contact and apart from issues of health and safety, tend to be more tolerant in those situations where the employee does not have any contact or has minimal contact with the members of the public. . . .*

. . .

[83] In *Hamilton Street Railway Co. v. Amalgamated Transit Union, Division 107* (1977), 16 L.A.C. (2d) 402, an employee was disciplined for failing to wear the uniform cap when in uniform during off-duty hours, contrary to the employer's policy. In that case, the employer had a public transportation monopoly in the City of Hamilton. The adjudicator was of the opinion that the absence of the cap did not tarnish the employer's public image, since it had a monopoly and could not lose business for that reason:

. . .

> *. . . In the instant case, the employer enjoys a public transportation monopoly in the City of Hamilton and consequently the interrelationship between image and loss of business is not determinative. Rather, the employer must satisfy the board that the failure of employees to wear the uniform cap when in uniform during off-work hours significantly damages the public's perception of the Hamilton Street Railway as an organization capable of providing safe, courteous and efficient public transportation or at least has the potential to do so.*
>
> *16. The board has not been convinced that the public image of the employer is sufficiently dependent upon the wearing of the uniform cap when in uniform during off hours as to justify the imposition of discipline for failure to comply with the rule. The board has not been presented with the "objective" evidence of the type referred to by Mr. Shime in Re Borough of Scarborough and Int'l Assoc. of Fire Fighters,*

> *Local 626. More importantly, however, the decision of the company to relax the hat rule so as to no longer require the wearing of the uniform cap while driving the vehicle indicates to the board that the wearing of the cap, in and of itself, is not, in 1977, a symbol critical to the image of the Hamilton Street Railway. Whereas the wearing of the cap may at one time have been an important component of the public image projected by the employer, the employer recognized changing community perceptions when, at the request of the union, it amended the hat rule in 1973. . . .*

. . .

[84] In *Canadian Air Lines Employees' Association v. Eastern Provincial Airways (1963) Ltd.*, [1979] C.L.A.D. No. 4 (QL), the adjudicator stated that the reasonableness of dress is not determined by a manager's opinion but is dependent on the employer's image or relation with its customers:

. . .

> ***41*** *The cases which have dealt with personal grooming rules make it clear that the fact an employee's appearance is not satisfactory to certain management personnel does not establish that the rule is reasonable or has been reasonably applied. There is a more objective requisite which must be shown and this is the need to demonstrate a likelihood that the Company image has been affected or there is a potential loss of sales.*
>
> ***42*** *This award is not to be interpreted by employees as suggesting the Employer must accept whatever type of personal appearance or grooming that employees wish to have. The Employer still retains the right under its regulations to insist on certain standards. However, the insistence upon compliance with these standards is subject to the criteria outlined previously in this award and in particular with respect to protection of Company image there is a certain onus of proof of either actual damage or potential damage to its image or its relation with its customers.*

. . .

[85] In *Pacific Western Airlines Ltd. v. Canadian Airline Employees' Association* (1981), 29 L.A.C. (2d) 1, two ground attendants were disciplined for wearing brown shoes rather than black shoes, contrary to the employer's directive that black shoes be worn. After analyzing the question of the reasonableness of the appearance rule and the balance between the employees' rights and the employer's interests, the adjudicator

explained how the rule had to be adapted to the context. As with the present grievance, the employees could put together and vary their clothing based on a choice of items. The adjudicator stated the following:

. . .

> *. . . Where the adverse impact of the company rule in question on the employees' personal life is as limited as it is here (and is likely to be in any "attire" case) I think the arbitrator should be concerned with the "balance of probabilities", not only with demonstrated financial loss, and he should be concerned to give the employers' judgment considerable weight on the question of the effect of appearance on the corporate image. In short, because acquiring the stipulated black belt and shoes would impinge, although relatively slightly, on the employees' off-duty life employer rules with regard to attire must be reasonable, but in determining what is "reasonable" considerable respect should be paid to the company's judgment about the importance of its image to its business.*
>
> . . .
>
> *Even in this context, however, the basic proposition, that a rule which includes situations in which it serves no useful purpose is not in those respects reasonable . . . still applies. Here even the company's own witnesses admitted, in effect, that by this definition the "black belt and shoe" rule was not "reasonable" in so far as it precluded employees from wearing perfectly matching burgundy shoes or grey shoes or mens' black shoes with a sole somewhat thicker than one centimetre. The company is not aiming to achieve an image of uniformity. The very fact that the uniform provided has so many components which may be mixed at the will of the employee suggests that a co-ordinated appearance within the limits of a prescribed range of colours and relative conservatism is the purpose. In so far as the company's rules reach beyond that purpose and constrain employees for, in effect, no reason they are unreasonable.*
>
> *Further support for the conclusion that the company's purpose is to achieve an image of co-ordination and relative conservatism rather than real uniformity in its employees' dress may be derived from the fact that new employees, new transferees and temporaries work in these "uniformed" positions in other than the grey and burgundy uniform components.*
>
> . . .

[86] *Canada Safeway Ltd. v. Retail Clerks Union, Local 206* (1982), 7 L.A.C. (3d) 140, deals with the authority of an employer working in the food industry to order an employee to shave his beard because of the employer's personal appearance code. In support of its position, the employer gave the arbitration board the results of a customer survey conducted in two areas to determine the effect of beards worn by its employees, having regard to its position in a highly competitive market. The majority of the arbitration board was of the opinion that the employer had reasonably justified its decision to prohibit beards:

. . .

> *For the reasons given by the company for its rule, together with the substantial support apparent from the Reid survey, both at Winnipeg and the replication survey in Sault Ste. Marie, we must conclude that on balance the individual employee preference must be subject to the overriding concern of his employer, which concern in our view is based in real terms on its assessment of its marketing and sales position in this area which is a justifiable and legitimate concern of the company. Whether the individual's beard is neat and well-trimmed is not the issue, but only begs the question of whether any form of beards are acceptable to the company and the reasonableness of its rule against wearing beards. In our view the company has demonstrated through the evidence of Mr. Parkyn and of Dr. Reid, that its rule is reasonable and is based on proper business considerations and therefore on that basis can be upheld.*

. . .

[87] In *Wardair Canada Inc. v. Canadian Air Line Flight Attendants' Association* (1987), 28 L.A.C. (3d) 142, the employer had required a male flight attendant to remove his earring while at work. There was no administrative regulation dealing with such a prohibition. The adjudicator was of the view that there was no objective evidence indicating that the wearing of earrings would adversely affect the profitability of the employer's business:

. . .

> *However, even though the employer has endeavoured to limit the constraint its rule imposes on the freedom of male flight attendants to wear the same jewellery as anyone else as narrowly as it could, it still cannot, in my view, be regarded as reasonable and justifiable over all. Even though the intrusion into the freedom of Mr. Elder may be narrower than parallel rules dealing with hair or beards, it is a rule*

> *which, in the end, the employer was unable to show served any legitimate business interest of its own. As I have already indicated, there was no suggestion that questions of health and safety justified the discriminatory treatment of male flight attendants. The fact female employees were allowed to wear jewellery of this kind would be unassailable evidence to the contrary. Nor was there a shred of evidence put forward by the employer to suggest that its financial position or its ability to make a profit would be adversely affected if its male flight attendants were allowed to wear the same kind of jewellery as women. Even if, as other arbitrators have held, it is not necessary for an employer to wait for a "specific complaint or a demonstrable falling off of business", before establishing that a rule is reasonable, there must be some objective basis to support the employer's claim that adverse consequences of that kind are likely to ensue. In my view, the judgment of the Supreme Court of Canada in Ontario Human Rights Com'n et al. v. Borough of Etobicoke (1982), 132 D.L.R. (3d) 14, [1982] 1 S.C.R. 202, 82 C.L.L.C. (para) 17,005, is relevant and would require the employer to adduce more than mere "impressionistic" evidence that its legitimate business interests will be adversely affected in the manner it predicts.*
>
> *The absence of any evidence of that kind in the circumstances of the instant case means that there is no legitimate basis on which the employer's rule can be justified. Failing to offer any objective evidence that allowing male flight attendants to wear jewellery will adversely affect their corporate image and ultimately their financial position leaves only Mr. Elder's image in the balance. Because the employer has done nothing to show that if the male flight attendants wear jewellery their corporate image and profit position will suffer accordingly, the limit on their and Mr. Elder's freedom to express themselves in what for them is an important and personal way is a needless and in that sense unreasonable constraint.*

. . .

[88] In *Toronto (City) v. Canadian Union of Public Employees, Local 43* (1989), 9 L.A.C. (4th) 330, the adjudicator was of the opinion that a disciplinary sanction imposed for wearing a cap with the logo of a tree maintenance service on it was excessive. The employer, which maintained municipal parks, was unable to prove on a balance of probabilities that its policy of selectively prohibiting the wearing of certain types of clothing truly protected its interests.

[89] In *The Empress Hotel v. Canadian Brotherhood of Railway, Transport and General Workers, Local 100,* [1992] B.C.C.A.A.A. No. 298 (QL), a restaurant employee

was disciplined for wearing his hair in a ponytail contrary to the employer's unwritten policy on the hair length of employees in contact with the public. The employer believed that ponytails had a negative effect on its customers even though the employee in question was a model employee. The adjudicator was of the opinion that the policy was unreasonable because it was not associated with any business or occupational health and safety concern:

. . .

> ***32*** *Dealing first with the second criterion, namely that the rule must not be unreasonable, I find that the subject rule is. In so doing, I adopt the following statement of Arbitrator Deverell, made some 17 years ago in the context of Air Canada flight attendants:*
>
> > *"(S)uffice it to say that I do not find Air Canada's hair grooming regulations to be reasonable in view of current trends of hair lengths and styles. I do not consider it reasonable for the employer to regiment length and style of hair - as long as it be of a clean, neat and attractive appearance . . ." (Re Air Canada; 9 L.A.C. (2d) 254.)*
>
> . . .
>
> ***33*** *While it is true that there may indeed be situations where the Employer's business interests may justify the promulgation of a policy which necessarily involves a significant invasion of its employees' privacy (e.g., the employee must change his appearance for all purposes, not simply for the time he is at work), there is a heavier onus on the employer to show an employment nexus where appearance is involved than would be the case if, for example, health and/or safety considerations were involved. . . .*

Comment [A1]: Again, inserted to match French, but should be confirmed against original.

. . .

[90] In *International Simultaneous Translation Services Inc. v. National Association of Broadcast Employees & Technicians* (1993), 33 L.A.C. (4th) 179, a technical support employee was dismissed for continuing to wear an earring despite several warnings and a memorandum to employees prohibiting male employees from wearing earrings. The adjudicator found that the employer's policy was unreasonable because there was no business reason for it:

. . .

There was no suggestion that the grievor's ear stud interfered with his work. This is not an issue which relates to the health and safety of employees. It has to do with the preservation and protection of the company's image, which, while a somewhat elusive concept, is none the less a real and valuable corporate asset worthy of protection.

This concept was recognized in Re United Parcel Service and Teamsters, Loc. 396 (1968), 52 L.A. 1068 (Kotin):

> *Companies providing a service to the public still have the right to protect their image. To the degree that that image is based on the appearance of its employees dealing with the public, the company has the right to establish rules and standards of personal appearance.*

Arbitrator Brandt in Re Allied & Technical Workers, Dist. 50 and Dominion Stores Ltd. (1972), 23 L.A.C. 257, spoke of the need to balance the employer's interest in maintaining a particular image with the legitimate interest of employees. At p. 261 he said:

> *While it may be recognized that the company has a clear interest in developing and maintaining a particular image it should also be recognized that there are certain correlative rights in the employee that also press for recognition. A useful discussion of the balancing of these competing interests is to be found in Economy Super Mart and Amalgamated Meat Cutters and Butcher Workmen, Local 612 (1970), 54 L.A. 816 (Elson), where at p. 819 it is said:*
>
> > *"The crux of the issue goes to individual rights. In general, in a society such as ours which is unregimented, how people wear their hair or dress is a matter largely for their individual determination . . . Rights of this character, however, may be qualified by the nature of one's employment."*

. . .

In Re I.A.F.F., Loc. 626 and Borough of Scarborough (1972), 24 L.A.C. 78 (Shime), the board said an employer may, in the

> *pursuit of its legitimate business interest, impose standards of dress and appearance but that (p. 84):*
>
> > *. . . an employee should only be subjected to the imposition of such standards not on speculation, but on the basis of legitimate and cogent business reasons which objectively demonstrate that an employee's dress or appearance are affecting his work performance or are adversely affecting the employer's business.*
>
> . . .

[91] Nonetheless, in *Canadian Freightways Ltd. v. Office & Technical Employees' Union* (1995), 49 L.A.C. (4th) 328, the adjudicator found that the employer's policy prohibiting men from wearing shorts even though women were allowed to wear them was not unreasonable. It was shown on a balance of probabilities that the employees' clothing had an effect on business. The adjudicator stressed the principle established by arbitral jurisprudence that, even though a grievance is filed by a bargaining agent or employee, the employer bears the burden of proving the reasonableness of the appearance rule or dress code. For this purpose, the employer must adduce evidence that goes beyond its own opinion:

> . . .
>
> *In the case of a commercial enterprise, where a dress rule is passed to regulate employee appearance for the benefit of the business image, the approach requires that the employer offer more than a verbal justification for its rule to prove that the rule is reasonable. In these circumstances, to be satisfied with a verbal justification alone would undermine the principle set out in KVP Co. to require that the rule-making power of the employer be exercised within the limits of what is reasonable. Surely "reasonableness" must have some objective standard to be meaningful and this objective evidence must be present in addition to the employer's rationale, however important that might be.*
>
> . . .

[92] On the other hand, in *Sudbury Public Library Board v. Canadian Union of Public Employees, Local 207* (1996), 55 L.A.C. (4th) 219, the adjudicator took the view that the employer's reputation would not be jeopardized if employees of the municipal library wore shorts. The employer had adopted a policy declaring shorts unacceptable as work clothing without providing any justification for that decision.

[93] In *Canada Safeway Ltd. v. United Food and Commercial Workers Union, Local 832* (1997), 63 L.A.C. (4th) 256, the employer had denied an employee access to the workplace because she had a piercing (nose stud). The employer argued that the highly competitive market in the food industry meant that a conservative appearance for its employees was very important to the profitability of its business. In addition to reiterating the case law principles concerning the reasonable appearance rule, the adjudicator discussed the evolution of our society toward greater tolerance in matters of individual appearance:

. . .

> *. . . Several generally accepted criteria to judge the appropriateness of such standards may be gleaned from the cases on which both Parties rely. The rules must: (1) relate to a legitimate business purpose; (2) be reasonably related to contemporary community standards; (3) not unduly or unnecessarily impinge upon the employee's personal rights; and (4) be consistently enforced.*
>
> *Another factor apparent from these decisions is that the standards employers have sought to enforce over the year, and the standards arbitrators have found to be reasonable or unreasonable, have changed as societal standards have changed. For instance, cases in the late 1960's and early 1970's considered rules prohibiting "Beatles like appearance," and hair and facial hair styles which were becoming popular at the time. Only recently have cases dealt with issues such as that raised in this case, as men began to wear to wear earrings and both men and women began to wear other facial jewelry such as nose studs or loops, eyebrow rings, and tongue studs.*
>
> *In this case, as in other reported cases, each Party asserts that its opinion as to what constitutes appropriate appearance is supported by objective evidence, while the opposing Party's opinion suffers from the fatal flaw of subjectivity. In fact, standards and opinions related to personal appearance are necessarily subjective, tod a large degree. Employer rules reflect the views of the employers as to what is appropriate in their workplace. The challenges of employees and unions to such rules reflect their views as to what they consider to be appropriate. As with most things having to do with fashion, there are no bright lines or hard and fast rules to govern such matters. Recognition of the inherent subjectivity of such opinions does not permit unfettered discretion by employers to dictate appearance. Nor do employees have unencumbered rights to dress as they wish at the workplace. Rather, the interests of employers and*

Comment [A2]: Assuming singular is a [sic] and not translator's typo.

Comment [A3]: Again, assuming [sic] and not translator's typo.

Comment [A4]: Note: there was originally a [sic} here from translator, so if above two sics are proven wrong, the [sic throughout] should be removed and this [sic] should be re-inserted.

> *employees must be balanced so as not to do violence to either. The standards set forth above have been arrived at over the years to accomplish that result.*
>
> . . .
>
> [*Sic* throughout]

[94] In *Canada Safeway Ltd. v. United Food and Commercial Works, Local 401*, [1998] A.G.A.A No. 94 (QL), which dealt with grooming (beards), the criterion of reasonableness and the burden of proof on the employer were described as follows:

> . . .
>
> ***33*** *Dealing first with the burden of proof issue, this Board is satisfied that it is well established in dress code and grooming cases that the Employer must bear the onus of showing on a balance of probabilities that it's [sic] policy is reasonable. Canada Safeway Limited v. United Food and Commercial Workers Union Local 832 (1997) (Teskey); Re Canadian Freightways Limited v. Office and Technical Employees Union (1995) 49 L.A.C. 328 (4th) (Korbin). Given the various amendments to the current "beard" policy over the years and the fact that the grooming policy is said by Safeway to "meet the approval of the majority of the public rather than the Employer", common sense dictates that Canada Safeway must justify its argument of reasonableness. This position is strengthened by the fact that this grievance did not arise due to customer complaints but came from management. Put another way, is Safeway's concern of a reasonable apprehension of business loss established by the evidence? In addition, given the fact that both parties acknowledged that to some extent this is a policy grievance, if the Employer meets this prima facie burden, then fairness would also dictate that the Union must then show on a balance of probabilities that this policy will not adversely affect market share. In this way a balance is struck between management rights and employee individuality.*
>
> . . .

Comment [A5]: Again, [sic] or translator's typo?

Comment [A6]: Is comma missing in original too, or should it be inserted here?

[95] In a recent case, *Calgary Co-operative Ltd. v. Union of Calgary Co-op Employees*, [2006] A.G.A.A. No. 1 (QL), the issue was the employer's policy requiring employees to wear shirts that were tucked in at the waist. According to the union, the policy was discriminatory because it was not appropriate for the body size of all employees. The employer's position was that a tucked-in shirt made a positive contribution to its image. Relying on the cases cited above, the adjudicator discussed the assessment of a reasonable policy and the need for the employer to justify its position:

. . .

> ***50*** *In the current case, I am adopting the Canadian Freightways "balance of interest" approach. In applying a balance of interest test, both the impact of a rule on employees and the objective evidence for its necessity provided by the company need to be examined. The greater the impact of the rule on employees, the stronger the justification that will be required. In practical terms, in situations in which there is no impact of a dress code rule on off-duty attire or appearance, it is unnecessary for an employer to establish that the rule is required to avoid a financial loss or a loss of business, only that the rule is logically connected to the company's overall business approach. This still requires objective evidence of some kind, whether through a survey or through management testimony, that can draw a clear link between the impugned rule and company business needs.*

. . .

The adjudicator concluded that the dress rule was not justified because the employer had been unable to establish a link between that rule and its business strategy. The rule also caused psychological distress to certain employees:

. . .

> ***61*** *To sum up, in balancing the rights of the employees against the legitimate business interests of the company, I find the evidence tilts in the employees' favour in this case. The evidence established that some employees feel personally humiliated and suffer emotional stress if they are required to wear their uniforms tucked-in. Although there was no evidence that the tuck-in requirement has any impact off the job, the Employer failed to establish through objective evidence a business rationale for its tuck-in rule. The survey it conducted simply was inadequate for the intended purpose and management was unable to offer a positive link between the tuck-in rule and its business strategy.*

. . .

[96] In addition to the cases cited above, I have also considered a recent Board decision dealing with the wearing of union items (pins, caps, shirts, etc.) that were not consistent with dress requirements, namely *International Association of Machinists and Aerospace Workers and District Lodge 147, National Association of Federal Correctional Workers v. Correctional Service Canada, Treasury Board and Don Graham*, 2005 PSLRB 50. However, that decision is not relevant to this case, because it deals with union

activity protected by the new *Act* rather than the wearing of a uniform as such. I will, therefore, make no further mention of it.

[97] Thus, the Public Service cases cited above, *Arnfinson, Massé* and *Guimond*, deal with the reasonableness of disciplinary action rather than the reasonableness of the rule itself, which is the issue raised by the present grievance. In *Arnfinson*, although the employee flouted the employer's authority rather like in this case, there was no serious consequence for the employee, except perhaps for his pride. *Massé* involved a workplace safety issue, which is an issue on which adjudicators are in general agreement when an employee refuses to comply with the dress policy. In *Guimond*, the employee's unconvincing reasons for refusing to comply with the dress policy were rejected out of hand. I do not consider *Demers* relevant to this case, aside from the fact that it involved the same employee. The fact that these adjudication decisions were made during a certain period of time (1982 to 1990) also limits their relevance.

2. Justification for dress requirements in the Public Service

[98] Before examining the principles established by private sector cases, I have considered the question of whether dress requirements in the Public Service must be applied more strictly than in the private sector because of the differing work context.

[99] The dress code at issue here states that the CSC's objectives include maintaining a professional image and distinguishing correctional officers from inmates and other staff members:

. . .

> ***OBJECTIVES***
>
> 1. *To identify uniform clothing entitlements for employees of the Correctional Service of Canada (CSC), including the CSC work and dress uniform, special occupational clothing and protective clothing items.*
>
> 2. *To ensure that CSC employees who wear CSC uniforms do so in a consistent manner that reflects positively on themselves and on the Service. The deportment and appearance of the wearer will reflect the professionalism of all Service personnel and the effectiveness of the Service in fulfilling its mandate.*
>
> 3. *To permit the easy identification of CSC personnel by inmates, other staff and the general public.*

. . .

[100] In my opinion, these objectives of the dress code raise the same concerns that the private sector employers in the above-mentioned cases had when they imposed dress requirements. Those concerns have to do with promoting the company's image because of the service it provides and identifying its employees. The fact that the CSC is part of the Public Service rather than a private sector employer has no impact on these concerns. I agree with *Hamilton Street Railway Co.* that a dress requirement is not unreasonable simply because the employer provides an exclusive service, has a monopoly on that service, or is part of the public sector.

[101] The *Uniforms Directive* is also consistent with the main principles established by private sector cases when it states the following:

. . .

> ***Purpose and scope***
>
> *It is the policy of the government to provide appropriate items of clothing to employees where the nature of the work is such that special protection is required or where special identification at the local, national or international level will aid in the effective performance of duties and in meeting program objectives.*
>
> . . .
>
> *This directive is intended to assist departments in ensuring that their practices provide adequate protection and identification for employees, are economical, equitable and reasonably consistent with those throughout the Public Service and are comparable with those for similar occupations outside the Public Service.*
>
> . . .
>
> [Emphasis added]

Thus, a requirement to wear uniforms as it generally exists in the Public Service has three objectives: identifying the employee's job, being appropriate to program functions, and being comparable with that for similar occupations in or outside the Public Service.

3. Justification for disciplinary action

[102] With regard to the general criteria set out in *Lumber & Sawmill Workers' Union* for rules imposed unilaterally by an employer, I conclude that, in the present grievance, a) pursuant to the first criterion, the CSC and the bargaining agent agreed on the uniform and the duty to wear it; b) pursuant to the third criterion, the description of the uniform is clear and unequivocal; c) pursuant to the fourth criterion, the uniform and the dress code were brought to Mr. Demers' attention; and d) pursuant to the fifth criterion, Mr. Demers was notified that any breach of the dress code could result in a disciplinary penalty. Accordingly, the grievance involves the application of the second and sixth criteria, namely the reasonableness and consistent enforcement of the dress code. Since these criteria are connected, it is appropriate to deal with them together in the following analysis.

[103] The facts relevant to both of these aspects are as follows. Contrary to previous uniform changes, the new uniform adopted in 2005 did not come into effect on a target date but was introduced gradually as uniform clothing items became available. The CSC allowed items from the former uniform, which had become "non-uniform items," and personal items such as coats, sweaters and shirts to be worn with the new uniform until the new items were made.

[104] Once he was ordered to wear his uniform on October 28, 2005, Mr. Demers complied with the requirements, apart from the fact that he added the tie from his former uniform.

[105] At the time Mr. Demers was warned and then fined, the CSC was still allowing correctional officers to wear the following non-uniform clothing items: crewneck sweaters rather than T-shirts, tuques rather than forage caps, and scarves, as shown by the memorandum of December 22, 2005, that formalized the wearing of those new clothing items as long as the correctional officers who wore them bore the cost themselves. This means that Mr. Demers was fined during a period when the wearing of the uniform was not being consistently enforced for all correctional officers.

[106] It will be recalled that the instructions the CSC applied strictly to Mr. Demers are the same ones that were supposed to apply to the other correctional officers who wore non-uniform clothing items. They are set out in paragraph 18 of the dress code:

> *18. Except where specifically authorized in this document:*
>
> *a. only Service-issued uniform items will be permitted, without substitution;*
>
> *b. no unsuitable or inappropriate clothing items will be worn with Service uniforms (e.g. scarves, white socks, t-shirts other than the approved black t-shirt) and…*
>
> . . .
>
> [Emphasis added]

[107] Moreover, paragraphs 16 and 17 of the dress code provide that there is more than one possible combination of articles of clothing that make up the work and dress uniforms:

> *16. Order of dress specifies that several combinations of articles of uniform clothing and accessories must be worn according to the occasion and the season.*
>
> *17. The CSC work and dress uniforms provide immediate and distinct identity to those who wear them. Only authorized personnel, including recruits are to wear these CSC uniforms.*

[108] Paragraph 16 of the dress code brings to mind *Pacific Western Airlines Ltd.*, in which the uniform included several combinations of clothing items. I adopt the reasons set out in that decision to the effect that, by choosing components that can be varied based on employees' tastes (shirts, shoes, belts, sweater, jacket and hats), the CSC's purpose is above all to achieve an image of uniformity and conservatism that reflects the professionalism of its employees, as shown by the following objective of the dress code:

> . . .
>
> *2. To ensure that CSC employees who wear CSC uniforms do so in a consistent manner that reflects positively on themselves and on the Service. The deportment and appearance of the wearer will reflect the professionalism of all Service personnel and the effectiveness of the Service in fulfilling its mandate.*
>
> . . .

[109] This brings us to the question of the reasonableness of the dress code's enforcement. As we have seen, the above-mentioned private sector decisions unanimously adopt the following principles:

a) an employer may impose personal appearance rules or a dress code on its employees provided that the requirements are reasonable (see, in particular, *Dominion Stores Ltd.* and *International Simultaneous Translation Services Inc.*);

b) employees are entitled to their individuality, and the employer does not have an absolute right to impose its image on its employees except where issues related to health and safety or protection of the employer's legitimate interests are involved (see *International Association of Fire Fighters*, *Dominion Stores Ltd.* and *The Empress Hotel*);

c) the employer's legitimate interests include both its image and the continuation of its business (see *International Association of Fire Fighters, Hamilton Street Railway Co.*, *Pacific Western Airlines Ltd.*, *Wardair Canada Inc.* and *Toronto (City)*);

d) the employer's image is measured not by its own opinion but rather by independent considerations (see *Sudbury Public Library Board*, *Wardair Canada Inc.* and *Canadian Air Lines Employees' Association*);

e) the dress rule must be clearly linked to the operation of the business and the employee's duties (see *Calgary Co-operative Ltd.* and *The Empress Hotel*);

f) where the appearance or dress rules are challenged, the employer bears the burden of proving on a balance of probabilities, through objective evidence, that the detrimental effect of the employee's appearance outweighs respect for the employee's rights (see *Hamilton Street Railway Co.*, *Canadian Air Lines Employees' Association*, *Wardair Canada Inc.*, *Canada Safeway Ltd.* (1998) *and Canadian Freightways Ltd.*);

g) this evidence may take the form of complaints received from customers or opinion surveys — conjecture and subjective impressions are clearly not enough (see *Canada Safeway Ltd.* (1982), *Canadian Freightways Ltd.*, *Sudbury Public Library Board*, *Wardair Canada Inc.* and *Canadian Air Lines Employees' Association*);

h) in assessing the reasonableness of the dress or appearance rule, the adjudicator must balance the employer's interest in imposing such a rule against the right of employees to respect for their individuality (see *International Association of Fire Fighters*, *Dominion Stores Ltd.*, *International Simultaneous Translation Services Inc.*, *Canada Safeway Ltd.* (1997) and *Calgary Co-operative Ltd.*).

[110] Although employees must follow their employer's instructions with regard to appearance rules, employers, in turn, have a duty to ask what concerns their employees have. In *Calgary Co-operative Ltd.*, the adjudicator considered the question of the humiliation and psychological distress caused by a dress rule and applied the balance of interest principle. He thus assessed the impact of the dress rule on the employees in light of the employer's objective evidence on the necessity of its rule. It will be recalled that, in that case, employees of a certain size felt humiliated by the employer's rule that they tuck in their polo shirts. The adjudicator stated that, the greater the impact of the rule on employees, the stronger the justification required from the employer. In *Canada Safeway Ltd.* (1997), another adjudicator concluded that a reasonable appearance rule had to take account of the evolution of our society toward greater tolerance of personal appearance (see also *Dominion Stores Ltd.*).

[111] Let us now look at the dress rule as it was applied to Mr. Demers. As we have seen, since such a rule has no impact on the individuality of employees in the sense that they can dress as they please outside of work, it can generally be enforced more strictly than a personal appearance rule. Although the prohibition on wearing a tie has an effect only during the work shift, it is my view that the CSC had to consider the fact that the psychological distress inflicted on Mr. Demers went beyond his work shift, since it was aware of his concerns before and at the time it fined him $75. I am satisfied from Mr. Demers' testimony and the psychiatric reports requested by the CSC that the dress rule prohibiting ties was carried to extremes in the circumstances of this case. Mr. Demers' testimony has also convinced me that being warned and having to publicly defend his reasons for not being able to work without a tie deeply humiliated him in front of his co-workers and supervisors. The psychiatrist who examined Mr. Demers noted on page 5 of his report of February 13, 2005, that he had suffered psychological trauma resulting from the intransigence of the CSC, which was unwilling to consider an exception to the dress rule. I am also of the view that the CSC did not make any effort to take account of Mr. Demers' circumstances or consider an

alternative to a fine. It let things deteriorate and then fell back on the psychiatric assessments to protect its position.

[112] The CSC's decision to strictly impose the uniform was not based on any of the objective criteria set out in the jurisprudence and was not consistent with the purpose and scope of the *Uniforms Directive*. The decision to prohibit Mr. Demers from wearing a tie was not based on any of the objective criteria related to identification with his work, program functions or comparability with similar occupations. It would have been appropriate for the CSC to ask itself the following questions about the reasonableness of the disciplinary action it intended to take:

- whether the fact that Mr. Demers worked at night was a mitigating fact;
- whether wearing a tie jeopardized Mr. Demers' authority in performing his work supervising inmates;
- whether the dress rule was comparable to that associated with similar occupations in or outside the Public Service.

[113] Mr. Demers argued that he had almost always worked at night and that he had no contact with the public, aside from inmates; that he had worked wearing a tie for 28 years without incident; and that he was always well dressed, as stated by his supervisor Mr. Sansoucy at the hearing and noted in the psychiatric report of February 13, 2006. Mr. Demers made inquiries with employers in a comparable field and learned that ties were optional. The respondent did not refute this evidence.

[114] I would add that the arguments raised by Mr. Demers during the hearing were not new ones. During his meetings with Mr. Sansoucy, Mr. Demers clearly expressed his concerns and the psychological distress that working without a tie was causing him. Mr. Sansoucy was unbending. Apparently, there was no question of considering an exception or consulting his supervisors. I note that Mr. Sansoucy admitted in his testimony that he would have allowed Mr. Demers to wear a tie if he had been authorized to do so.

[115] I also adopt the comment made in *International Association of Fire Fighters*, namely that an employer's interest lies above all in having its employees perform a fair day's work and that the dress rules it imposes on them are secondary. As stated in *Dominion Stores Ltd.*, a distinction should be drawn between situations in which an

employee is in contact with the public and situations in which the employee is not; situations in which health or safety may be at risk must also be distinguished (see also *International Association of Fire Fighters* and *The Empress Hotel*). In the present case, Mr. Demers works at night, works only with inmates and has no contact with the general public. Wearing a tie has no negative impact on the health or safety of Mr. Demers, his co-workers or the inmates he supervises. In short, wearing a tie has no negative impact on the quality of his work. It does not damage the public's perception of the CSC's mandate (see *Hamilton Street Railway Co.*).

[116] It should be noted that the dress code provides for the possibility of making certain exceptions, in, *inter alia*, paragraphs 43 to 46 and 54. More to the point here, the dress code allows exceptions in the case of allergies or medical requirements. In my opinion, these exceptions reflect the possibility of enforcing the dress code in a reasonable manner, something that could have been considered in Mr. Demers' case.

[117] In light of the facts and the evidence before me, I am satisfied that there was no reason based on the CSC's mandate, operations or public image for it not to carefully consider the concerns raised by Mr. Demers before imposing the $75 fine. Contrary to what the jurisprudence requires, the respondent did not produce any objective evidence, apart from a manager's personal opinion, that ties were not consistent with "the professionalism of all Service personnel and the effectiveness of the Service in fulfilling its mandate." What the situation comes down to is the authority of a person, on the basis of his position, to impose his interpretation of a policy on his subordinate without considering the consequences of that interpretation.

[118] I therefore conclude that the dress code, a unilateral CSC rule, was applied unreasonably to Mr. Demers and that the $75 fine was unjustified.

C. <u>Access to the institution</u>

[119] Following his meeting with Mr. Sansoucy on December 8, 2005, Mr. Demers left Cowansville Institution immediately and, in a state of distress, went to the emergency room at his hospital, where he was diagnosed as being in an "[translation] interpersonal crisis / adjustment crisis situation." A physician then put him on leave from work for a period of three months. Mr. Demers then made his industrial accident claim. On December 26, 2005, he tried to resume working the night shift, saying he was better. The CSC denied him access to Cowansville Institution because he could not

submit a medical certificate stating that he was fit to resume work. On January 17, 2006, counsel for Mr. Demers wrote to the CSC asking it to reconsider its decision to prohibit Mr. Demers from wearing a tie. On January 25, 2006, the CSC replied that it was standing by its position that no tie could be worn and that Mr. Demers had to submit a medical certificate stating that he was fit for work before he could come back to work.

[120] Because of the CSC's decision, Mr. Demers' attending physician prohibited him from returning to work. As a result, he was unable to provide the medical certificate requested by the CSC.

[121] There is consistent jurisprudence to the effect that, where an employee is absent because of an industrial accident or for an extended period of time, the employer may require a medical certificate of fitness for work before authorizing the employee to return to work. In this regard, the respondent cited *Stinson*, *Lorrain*, and *Ricafort*, as well as paragraph 7:6142 of *Canadian Labour Arbitration*.

[122] Nevertheless, it is my view that the principles stated in the decisions on which the respondent relies do not apply in the specific circumstances of this case for the following reasons. I have concluded that the fine imposed on Mr. Demers was an unjustified disciplinary penalty. According to the respondent's evidence, psychological distress over being prohibited from wearing a tie became apparent before the meeting on December 8, 2005, as shown by the email of December 2, 2005, from Mr. Desrosiers to Mr. Sansoucy. That distress emerged in acute form during the meeting on December 8, 2005, and this was recorded in an observation report. The respondent, therefore, cannot deny that the CSC was aware of Mr. Demers' personal situation or that it could have taken preventive action. The CSC did not concern itself with Mr. Demers' well-being until February 2006, when it asked him to undergo a psychiatric assessment so he could return to work. As has already been explained, the psychiatrist confirmed the attending physician's opinion as to the reason Mr. Demers had been absent since December 8, 2005.

[123] I emphasize the psychiatrist's conclusion that Mr. Demers' stress increased because the CSC stood by its decision to prohibit the wearing of a tie. As a result, he is now unfit to return to work for an indefinite period. The second psychiatric assessment confirmed that Mr. Demers' condition had worsened. Both psychiatric

assessments concluded that Mr. Demers' condition would last as long as the CSC insisted that he not wear a tie.

[124] These facts lead me to conclude that Mr. Demers went on sick leave against his will as a direct result of the stress caused by the CSC's continued intransigence about the prohibition on wearing a tie. Having found that the CSC did not try to find a reasonable solution for Mr. Demers before imposing a penalty on him, contrary to what the dress code allows, I am of the opinion that Mr. Demers should not lose any income as a result of taking involuntary sick leave. Accordingly, I order the respondent to compensate Mr. Demers for the lost benefits and income resulting from such sick leave.

[125] I give the parties a period of 60 days to agree on the amount of such losses. If the parties do not agree, I will hear them on the quantum issue. In the meantime, I strongly encourage the parties to avail themselves of the mediation services offered by the Board. This entire situation suggests an amicable settlement. If the parties are unable to agree, I retain jurisdiction over the issue of the appropriate remedy.

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

(The Order appears on the next page)

V. Order

[127] The $75 financial penalty is reversed. I order the respondent to reimburse that amount to Mr. Demers.

[128] I retain jurisdiction over this case for a period of 60 days to enable the parties to agree on the amount representing the lost benefits and income resulting from Mr. Demers' sick leave. If the parties are unable to agree on that amount, Mr. Demers may request, before that 60-day period ends, that the hearing resume so the parties may argue the issue before me.

August 16, 2007

Michele A. Pineau,
adjudicator