Date: 20090612

File: 566-02-2350

Citation: **2009 PSLRB 75**

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

LAURIANNE BENCHARSKI

Grievor

and

DEPUTY HEAD
(Correctional Service of Canada)

Respondent

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

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: George Filliter, adjudicator

For the Grievor: Jessie Caron, Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada — CSN

For the Respondent: Chris Bernier, counsel, Eve Roquebrune, labour relations advisor

Heard at Saskatoon, Saskatchewan,
May 5 to 8, 2009.

I. Individual grievance referred to adjudication

[1] Laurianne Bencharski ("the grievor") is a correctional officer employed by the Correctional Service of Canada ("the employer"). She has been serving in that capacity at the Saskatchewan Penitentiary ("the penitentiary") in Prince Albert, Saskatchewan, since 1997. She has had a history of leave-related issues. On May 30, 2008, she was fined $160.00 for failing to provide a medical certificate in support of her absence. In her opinion, for a variety of reasons that will be outlined later, she filed a grievance because she felt that the disciplinary sanction was unwarranted.

II. Preliminary matters

A. Employer's objection to my jurisdiction

[2] In the grievance, the grievor refers to the Attendance Awareness and Management Committee (AAMC). The parties were in agreement that the AAMC was created under the Prairie Region Attendance Awareness and Management Program (AAMP). The AAMP was a joint initiative of the Prairie Region of the employer and the Union of Canadian Correctional Officers — Syndicat des agents correctionnels du Canada ("the bargaining agent"). In January 2007, a document was published outlining the AAMP.

[3] The evidence suggested that at one time, the penitentiary implemented an AAMC, but there was conflicting testimony as to whether an AAMC existed at the time the grievance was filed. Jason Layman, a correctional officer at the penitentiary, testified for the grievor. He had served in various positions within the local of the bargaining agent, and he testified that the AAMC was in place. Jason Hope, who assumed the position of Warden at the penitentiary in February 2008, testified that when he arrived there was no AAMC in place. He testified that he spoke with bargaining agent officials about naming their representatives to the AAMC. Mr. Layman confirmed that he had not been part of those discussions since he left the position of President of the bargaining agent local in January 2008.

[4] I find that, if an AAMC had been struck, it had lapsed either due to inactivity or due to other reasons, but in any event, it was not in existence at the penitentiary at the relevant time of this grievance, which was filed on May 30, 2008.

[5] The employer noted that it objected to the reference to the AAMC in the grievance and submitted that I lacked jurisdiction to interpret or consider the matter as the AAMP was not part of or otherwise incorporated into the collective agreement. The collective agreement in question is the "Agreement between the Treasury Board and the Union of Canadian Correctional Officers – Syndicat des agents correctionnels du Canada – CSN" expiring on May 31, 2010. At the start of the hearing, counsel for the employer expanded on the position and indicated that, in reality, its concern was with the corrective action requested by the grievor.

[6] The grievance states as follows:

> *Details of Grievance:*
>
> *Since December 30th 2007 I have been continually disciplined over my unscheduled leave usage. In direct contrast to the Prairie Region Attendance Awareness and Management Program Guidelines for correctional officers. I have been continually made to explain my leave patterns to different supervisors after first satisfying my correctional supervisors concerns over my leave. These supervisors have disciplined me and implemented restrictions on my leave without first going through the 'Attendance Awareness and Management Committee (AAMC)". Information which I provided to these supervisors verbally and written, is being documented on my correctional supervisor notes which is accessable by many staff members. This is again in direct contrast to the direction sent out in the Attendance Awareness and Management Program.*
>
> *Corrective Action Required:*
>
> *1. To have all disciplinary action taken against myself in regards to my leave removed from my file, and to be reimbursed the monatary fine awarded to me.*
>
> *2. To have all information regarding my leave removed from the correctional supervisor notes and placed on my leave file (if applicable) at HR as directed by the Attencence Awareness Guidelines.*
>
> *3. To have other C/S's instructed that I satisfied my obligations as the employee under the Attendence Awareness Protocol as far as explaining my leave to my correctional supervisor and that they should have no part to play in monitoring my leave in the same fashion thereafter.*

> *4. If any action is to be taken against me regarding my leave, that I be brought before the Attencence Awareness Committee in the future.*
>
> *5. Prior to any action taken against me regarding my leave I wish to be referred to the (AAMC).*
>
> [*Sic* throughout]

[7] In particular, counsel for the employer suggested that I was without jurisdiction to render an order, as requested by the grievor in paragraphs 3 to 5 of the grievance. In addition, counsel for the employer submitted that the last seven words in paragraph 2 also rendered me without jurisdiction.

[8] Counsel for the grievor moved to amend the grievance by deleting paragraphs 3 to 5 and also by removing the last seven words in paragraph 2. Although counsel for the employer wanted the record to indicate that he did not consent to that amendment, I granted the motion.

[9] In coming to that conclusion, I reminded the parties that, when I read the grievance, it appeared to essentially relate to a disciplinary action taken by the employer, which counsel for the grievor confirmed. As such, the employer could not and in fact did not express any surprise by the request.

[10] Accordingly, the corrective action requested in the grievance was amended to read as follows:

> *1. To have all disciplinary action taken against myself in regards to my leave removed from my file, and to be reimbursed the monatary [sic] fine awarded to me.*
>
> *2. To have all information regarding my leave removed from the correctional supervisor notes and placed on my leave file (if applicable) at HR.*

[11] As a result of the amendment and counsel for the grievor's submission that the AAMP would be used only as a defence to the disciplinary action and would not suggest that it formed a part of the collective agreement, the preliminary objection raised by the employer became moot. Accordingly, I advised the parties that I would not render a decision on the issue of whether the AAMP was incorporated into the collective agreement or otherwise interpret the AAMP. In addition, as will be seen later

in this decision, I have determined that references to the AAMP and the AAMC by the grievor are irrelevant.

B. Issue to be decided

[12] The issue can be simply stated. Was the disciplinary action taken by the employer against the grievor reasonable? My authority is found in subsection 209(1) of the *Public Service Labour Relations Act*, which states the following:

> ***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*
>
> *. . .*
>
> (b) *a disciplinary action resulting in termination, demotion, suspension or financial penalty;*
>
> *. . .*

C. Relevant provisions of the collective agreement

[13] Both parties agreed that the relevant provisions of the collective agreement are clauses 31.02 and 31.03, which read as follows:

> *31.02 An employee shall be granted sick leave with pay when he or she is unable to perform his or her duties because of illness or injury provided that:*
>
> *a) he or she satisfies the Employer of this condition in such manner and at such time as may be determined by the Employer,*
>
> *and*
>
> *b) he or she has the necessary sick leave credits.*
>
> *31.03 A statement signed by the employee stating that because of illness injury he or she was unable to perform his or her duties, shall, when delivered to the Employer, be considered as meeting the requirements of paragraph 31.02(a). However, the Employer may ask for a medical certificate from an employee, when the Employer has observed a pattern in the sick leave usage.*

III. Employer's position

[14] The employer submitted that the disciplinary action was reasonable. Counsel for the employer submitted that my authority was limited to determining if the disciplinary sanction was fair and reasonable (see *Paradis v. Treasury Board (Revenue Canada, Customs and Excise)*, PSSRB File No. 166-02-14626 (19850613)). Furthermore, counsel for the employer submitted that an adjudicator ought not to interfere with a disciplinary penalty that is neither excessive nor unreasonable (see *Russell v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-22980 (19930621)).

[15] Counsel for the employer reminded me that the employer bears the onus of establishing that the discipline imposed was reasonable under the circumstances of the case (see *Tobin v. Treasury Board (Correctional Service of Canada)*, 2007 PSLRB 26). In this case, the employer submitted that the grievor was given a clear and lawful order requiring her to supply a medical certificate when she returned from sick leave. The certificate was to be supplied on her first day back at work. The order was issued after a disciplinary hearing, conducted in late February 2008, which resulted in a written reprimand dated March 19, 2008. The supervisor in charge repeated the order to the grievor in a telephone conversation on May 9, 2008, when she called in sick.

[16] The employer submitted that the authority to issue the order was found in clauses 31.02 and 31.03 of the collective agreement and that the order was both reasonable and justified given the grievor's history of absences. The employer also submitted that the fine was the next step in progressively disciplining the grievor, that it was appropriate under the circumstances and that it was authorized by the Global agreement between Correctional Service Canada (CSC) and the Union of Canadian Correctional Officers — Syndicat des agents correctionnels du Canada — CSN (UCCO-SACC-CSN) ("the agreement").

[17] The employer submitted that the law is well settled in that an adjudicator ought not to modify a disciplinary penalty solely on the grounds of compassion or to second guess the employer (see *Miller v. Treasury Board (Department of National Defence)*, PSSRB File No. 166-02-13697 (19830222)).

IV. Grievor's position

[18] The grievor's position was that the disciplinary action, being fined $160.00, was not reasonable given the circumstances of the case. The grievor acknowledged that an

order or instruction was given to her as a result of a February 2008 disciplinary hearing that resulted in a written reprimand. The order was for the grievor to provide a medical certificate on the first day after her return from sick leave for future absences. It was acknowledged that a supervisor repeated the order on May 9, 2008, when the grievor called in sick. Furthermore, the grievor did not take issue with the fact that the order was given by someone in authority and that it was clearly communicated.

[19] However, the grievor took the position that the order was not lawful. First, it was impossible to obey in all circumstances, such as in the circumstances of this case. As such, it cannot be considered lawful. Second, the grievor submitted that the employer failed to establish that it had the authority under the collective agreement to require her to submit medical certification of her sick leave as it had not proven that a "pattern" had been observed.

[20] Specifically, counsel for the grievor submitted that the employer could not rely only on data that it referred to as "excessive leave usage" to establish a "pattern" as envisioned in the collective agreement. The grievor submitted that, to establish a "pattern", there had to be evidence of behaviour and that this could be proven only after a discussion with the grievor in which the reasons for the absences would be discussed. To quote counsel for the grievor, ". . . one cannot establish a pattern on data alone."

[21] Finally, the grievor questioned whether the discipline was truly progressive. In making her submission, counsel for the grievor noted that the written reprimand given to the grievor on March 19, 2008 was for taking 2.862 hours of annual leave without the necessary credits. She also noted that the discipline imposed on May 30, 2008 as a result of the grievor's actions on May 9, 2008, was for the grievor failing to follow her supervisor's instruction to supply a medical certificate on her first day at work after returning from sick leave.

V. Circumstances that led to the fine

[22] The employer called as witnesses Mr. Hope, Glen Frank, the correctional manager at the penitentiary since 2007, and Grant Fowler, the correctional manager for operations at the penitentiary since 1998. The grievor and Mr. Layman testified.

[23] The maximum-security section of the penitentiary is composed of two units, referred to as Unit 6 and Unit 7, which house approximately 200 inmates. Additionally, the medium-security section houses about 536 inmates.

[24] The grievor began working at the penitentiary in 1997. She has worked in the maximum-security section since 1999. She testified that, in 2005, she and her husband of 13 years separated and that she then became a single parent of two young children. At that time she resided approximately 50 km from the penitentiary in a rural area where there were few child care options. This caused her hardships, and as a result, she began missing days at work since she was working in a rotating shift position.

[25] In August 2006, she spoke with her immediate supervisor, Allan Mardell, and explained her circumstances. He suggested that she apply for a "5-2" position that was about to be vacated. The "5-2" position involved regular hours, Monday to Friday, with Saturday and Sunday off. The grievor followed his suggestion and was successful in obtaining the position.

[26] In October 2006, the grievor purchased a home in Prince Albert. With the approval of Mr. Mardell, she took a leave of absence without pay from October 23 to November 13, 2006. The purpose was to situate herself and her family in their new home.

[27] The evidence of Messrs. Frank and Fowler confirmed that, on January 24, 2007, Mr. Fowler spoke to the grievor about the absences that had occurred earlier that month. In fairness to Mr. Fowler, he could not recall if he actually used the words "oral reprimand" in that discussion, but that was, in his view, what had occurred that day. The grievor acknowledged the conversation. However, she testified that she did not understand it to be an oral reprimand, as those words were not used.

[28] In March 2007, the grievor became ill. She testified that she had been diagnosed with cancer. The cancer resulted in her having three separate surgeries between April and August 2007. Additionally, beginning in September 2007, the grievor underwent numerous radiation treatments continuing until January 2008. The grievor admitted that she had not advised many people of her situation other than Mr. Mardell, with whom she had spoken in confidence.

[29] At the end of October 2007, because of her reaction to the radiation treatments, the grievor took certified sick leave until the end of December 2007. In support of that leave, the grievor submitted a note from the specialist that was treating her. At that time, neither Mr. Mardell nor anyone in management questioned the leave.

[30] On March 19, 2008, Mr. Fowler issued a written reprimand to the grievor. A disciplinary hearing had been held on February 22, 2008. The evidence confirmed the grievor had not attended an earlier disciplinary hearing that had been scheduled for February 14, 2008, but I fail to see the relevance given the subsequent hearing.

[31] The reprimand was issued because the grievor had taken annual leave of 12.5 hours, which was 2.862 hours more than she had accumulated. The notice of the disciplinary hearing, and indeed Mr. Fowler's notes from it, indicate that the hearing had originally been scheduled to investigate several sick days taken by the grievor allegedly without certification from a doctor. During the hearing, the grievor established that she had supplied the necessary documentation. It was also clear from Mr. Fowler's testimony that his concern was the grievor's "excessive leave usage."

[32] In any event, the written reprimand was issued for the reasons stated above, and it concluded as follows: "Laurie has also been advised that when sick leave is utilized certifacation [*sic*] must be submitted the day she returns to work."

[33] The employer submits that the order was violated on May 9, 2008, resulting in the disciplinary action that is the subject of this grievance. The grievor acknowledged that she did not file a grievance with respect to the reprimand.

[34] Evidence was introduced that indicated that the grievor's attendance was less than splendid. In fact, the grievor, through her counsel, stipulated that, as of May 9, 2008, she had missed a significant amount of time. At the start of the fiscal year on April 1, 2008, the grievor had a negative balance of 198.2 hours of sick leave.

[35] In my opinion, that was clearly Mr. Fowler's main concern. On March 19, 2008, the same day that he issued the written reprimand, he provided the grievor with a referral to Health Canada for a fitness-to-work assessment. In the request, he identified in detail all the grievor's absences since 2006. It included the leave without pay that the grievor took in 2006 when she moved into her new home and the time she had off fighting cancer in 2007 and early 2008.

[36] It is important to note that, throughout the documentation and the testimonies of Messrs. Fowler, Frank and Hope, the employer explained its concern as "excessive leave usage." Furthermore, Mr. Fowler acknowledged speaking with the grievor's immediate supervisor, Mr. Mardell, and being told, without specifics, that the grievor had a serious medical condition.

[37] According to the grievor's uncontested testimony, Mr. Mardell knew the reasons for all the absences in 2006, 2007 and 2008. There is no evidence before me that Mr. Mardell was in any way concerned about the grievor's attendance record, which is noteworthy, given that he was her immediate supervisor. Mr. Fowler's evidence was that he had spoken with Mr. Mardell and that he had been made generally aware of what were described as "significant health issues," but Mr. Mardell maintained the grievor's confidence. Despite this, Mr. Fowler proceeded to discipline the grievor for using 2.862 hours of annual leave without the necessary credits and to issue a referral to Health Canada for a fitness-to-work assessment.

[38] The grievor had concerns about the Health Canada referral and thought that it was disciplinary in nature. She eventually realized that that was not the intent. During the hearing, she testified that she still had not consented to the fitness-to-work assessment.

[39] On May 9, 2008, the grievor was scheduled to work at the penitentiary from 18:45 to 07:15 on May 10, 2008. The grievor testified that she and her children had not been feeling well but that she had hoped that the symptoms would pass. She contacted her manager, Mr. Frank, to request four hours' leave for family reasons, which he granted.

[40] At 17:50, the grievor was still not feeling well. She then called and asked for 8.5 hours of annual leave, which Mr. Frank denied because the grievor had not given two days' notice, because three persons were already on vacation (the allowed allotment) and because the only way to cover her absence would have been with overtime. The grievor testified that she asked for annual leave because she was trying to build up her sick leave credits, which by that time were in a negative balance situation because she had borrowed 200 hours with the warden's approval.

[41] The grievor also attempted to have a colleague cover her shift but was unsuccessful. Later that night, the grievor called the Acting Deputy Warden and made

the same request for annual leave, which was similarly denied. During the conversation, the grievor testified that she told the Acting Deputy Warden that Mr. Frank had already denied a similar request but that she was hoping that the Acting Deputy Warden might grant the request for compassionate reasons.

[42] At 21:30, the grievor called Mr. Frank and indicated that she was ill and was not coming to work. Mr. Frank advised her that, as a result of the written reprimand of two months earlier, she would be required to bring in a medical certificate on the day of her return. The grievor acknowledged the requirement.

[43] On May 10, 2008, the grievor was on annual leave and had commitments in Regina, so she did not attempt to see her doctor to obtain a medical certificate.

[44] The grievor returned to work on May 11, 2008. On May 12, 2008, Mr. Frank asked her about the medical certificate. Mr. Frank stated that she indicated that she had obtained one but that she had left it at home. The grievor, on the other hand, stated that she simply said that she could get a certificate and suggested that Mr. Frank indicated that it was too late as the note was due the day before.

[45] The grievor submitted into evidence a certificate signed by her doctor and dated May 14, 2008, indicating that she had been unable, for medical reasons, to work on May 9, 2008. The certificate was never provided to the employer until this hearing and, similar to the refusal to submit to a Health Canada referral, no explanation was provided.

[46] As a result of the May 30, 2008 disciplinary hearing, Mr. Fowler determined that, in accordance with the principles of progressive discipline, he would impose a fine of $160.00. I was referred to Part III, Article III-A – Disciplinary measures, of the Global agreement. In that article, it is clear that the parties addressed and agreed to, under some circumstances, the imposition of fines in lieu of suspensions without pay.

[47] Furthermore, a Treasury Board directive entitled “Guidelines for Discipline,” dated April 1, 2005, was introduced as an exhibit. It notes that a financial penalty can be imposed where it is “. . . considered preferable for operational or economic reasons.” In fact, a financial penalty is considered appropriate in “. . . continuous shift operations . . . .” Mr. Hope testified that, as warden, he tends to impose financial penalties rather than suspensions in all but the most severe of cases. He explained that

he does that both for operational and for economic reasons. The grievor did not seriously contest the issue.

VI. Reasons

[48] At the outset, before delving directly into the issue, I will deal with the references to the AAMP made by both parties. A fair amount of evidence was devoted to whether there was or should have been an AAMP in place at the penitentiary. Furthermore, both parties spent a significant amount of time in argument dealing with this issue. In my view, the entire issue surrounding the AAMP is irrelevant or, as I suggested at the hearing, a "red herring." I have found that there was no AAMC in place at the penitentiary at the relevant time, so even if the grievor had been a candidate for referral to that program in 2008, it would not have been possible.

[49] Furthermore, and perhaps more to the point, I am of the view that, based on the testimony before me, the grievor was not a candidate for referral to the AAMP in 2008. The most basic review of the AAMP document shows that employees are referred when there is a suspicion of misuse or abuse of leave. There was absolutely no evidence to suggest that the grievor had either misused or abused her leave or indeed that management was suspicious of misuse or abuse. The only concern voiced in evidence was described as "excessive leave usage."

[50] Was the grievor required to obey the written order of March 19, 2008 reiterated verbally by Mr. Frank on May 9, 2008? That really is the only issue before me, even though the grievor suggested that the lawfulness of the order is the issue I should decide.

[51] That said, I am of the view that the order was justified by virtue of clauses 31.02 and 31.03 of the collective agreement. I interpret those clauses as meaning that the employer will accept a statement signed by an employee as adequate proof, unless ". . . the Employer has observed a pattern in the sick leave usage." At this point, the employer can require the employee to provide a medical certificate.

[52] In the circumstances of this case, the employer consistently referred to the grievor's "excessive leave usage." Although the collective agreement uses the word "pattern" in clause 31.03, I do not believe that this restricts the inherent rights of management to the extent proposed by the grievor. I conclude that in a case where

there is "excessive leave usage", an employer must be able to monitor the reasons for all leave. This right would be for any number of valid reasons, but would include the obligation to ensure the safety of the work place both for the worker as well as for the rest of the work force.

[53] Certainly, in situations where an employee is away from the workplace for a period of longer than a couple of days, it is not improper to require a certificate from a doctor on his or her return. What about a situation, such as in this case, where the employee is on sick leave for only a portion of his or her shift? Does that mean that, in such a situation, an employee will be required to visit a doctor to obtain a certificate, rather than going home and resting? The answer to this question would be yes, but that is the purpose of the generally accepted labour law principle of "obey now and grieve later." The grievor in this case should have obtained a medical certificate as ordered and provided it to the employer. If it had not been accepted by the employer, either the employer could have refused the form and disciplined the grievor, or refused the form and offered the grievor another type of leave. In either case the grievor could have filed a grievance and had it dealt with appropriately.

[54] Insofar as the submission of the grievor that the order was unlawful, I am not convinced that this argument has merit under the circumstances of this case. I have dealt with one aspect of this submission in paragraph 52 of this decision, however with respect to the suggestion that the order could not have been followed because an employee can not always make arrangements to meet with a doctor after a short absence, this argument must be dealt with on a case by case basis. In the matter before me, the grievor actually had a scheduled annual leave day immediately following her absence and the only evidence presented as to why she did not try to see her doctor was that she had commitments in Regina. If this was the case, the grievor should have provided the medical certificate that was obtained later and provided an explanation to the employer. Based upon the response of the employer the grievor may have decided to file a grievance.

[55] Specifically, I conclude that the grievor has failed to comply with the order of the employer, that being to provide a medical certificate the first day or her return to work. She should have provided the employer with the medical certificate that she obtained four days after her return to work and filed a grievance if it had been refused.

[56] This situation is an example of very poor communication between the parties, and in my respectful opinion, it should never have been brought to adjudication. By using the "word communication," I wish to emphasize that communicating does not simply mean stating one's position. I am often reminded that we have two ears and one mouth, for which there may very well be a good reason. Communication means listening as well as speaking.

[57] The managers, Messrs. Fowler and Frank, did not communicate with the grievor and ask her for an explanation before embarking on the disciplinary approach. In addition, they did not listen to the grievor's immediate supervisor, Mr. Mardell. He was aware of the reasons for most of the absences that created what in the view of Messrs. Fowler and Frank was an "excessive leave usage.", as Mr. Mardell would likely have informed Mr. Fowler that there were good reasons for the amount of time used by the grievor, and this could have been done without breaching any confidences. Good communication would have resulted in an entirely different approach.

[58] The grievor did not help herself in any way and was, in some respects, the author of her own misfortune, insofar as the discipline imposed on her was concerned. She could have and should have provided her supervisor with the medical certificate that she obtained on May 14, 2008. Furthermore, she had ample opportunity to advise Mr. Fowler, without unduly divulging her medical status, that there were good reasons for her absences and that her immediate supervisor had expressed no issues. For instance, that discussion could have taken place when she was provided with the referral to Health Canada.

[59] Unfortunately, the parties did not communicate with one another, and as a result, the disciplinary action was imposed, leading to this adjudication. I hope that everyone involved has learned a very valuable lesson.

[60] In any event, despite any of my commentary above, I have concluded that the order or direction given to the grievor on March 19, 2008 and reiterated verbally by Mr. Frank on May 9, 2008 was not in violation of the collective agreement and that it was within the inherent rights of management to make. Therefore, the resulting disciplinary action imposed on the grievor for failing to obey the order is upheld. In my view, the discipline imposed on the grievor was appropriate and reasonable. On it's face it is progressive in nature and although the grievor's counsel did raise this issue,

she did not articulate the basis of her position or provide me with any jurisprudence that would have been of assistance

VII. Decision

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

(The Order appears on the next page)

VIII. Order

[62] The grievance is denied.

June 12, 2009.

George Filliter,
adjudicator