Date: 20110921

Files: 566-02-1991 to 1995 and 2862

Citation: **2011 PSLRB 112**

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

THADDEUS YARNEY

Grievor

and

DEPUTY HEAD
(Department of Health)

Respondent

Indexed as
Yarney v. Deputy Head (Department of Health)

In the matter of individual grievances referred to adjudication

REASONS FOR DECISION

Before: Joseph W. Potter, adjudicator

For the Grievor: Himself

For the Respondent: Karen L. Clifford, counsel

Heard at Ottawa, Ontario,
May 9, 10 and 24, 2011.

Written submissions
received July 28, August
1, 10, 18 and 24, 2011

I. Individual grievances referred to adjudication

[1] This case concerns six grievances, five of which involved suspensions of varying lengths imposed on Dr. Thaddeus Yarney ("the grievor") in 2006 and 2007. In his sixth grievance (PSLRB File No. 566-02-2862), the grievor alleged that the deputy head of the Department of Health, ("the respondent") refused to allow him to return to work or to telework. The respondent challenged my jurisdiction to hear the sixth grievance, stating that it did not meet the requirements of the *Public Service Labour Relations Act* (*PSLRA*).

[2] The first five grievances indicate that the grievor is a biologist with Health Canada, classified BI-04. His bargaining agent is the Professional Institute of the Public Service of Canada ("the bargaining agent"). A bargaining agent representative signed each of the first five grievances, along with the sixth.

[3] The grievances were scheduled to be heard in November 2009, but the respondent requested a postponement. The bargaining agent objected and suggested that the dates could be used for mediation. The respondent agreed. The Public Service Labour Relations Board (PSLRB) confirmed the postponement of the hearing to pursue mediation. (See the letter to the parties dated October 21, 2009.)

[4] On the day scheduled for mediation, the grievor emailed his bargaining agent, asking that it be postponed.

[5] The PSLRB informed the parties via letter dated December 21, 2009 that the grievances would be heard at adjudication from May 31 to June 3, 2010.

[6] However, counsel for the respondent became ill in April 2010 and requested a postponement. The bargaining agent agreed, and the PSLRB advised the parties of the postponement on May 13, 2010.

[7] The hearing was rescheduled for September 20 to 22, 2010, and the parties agreed to a pre-hearing conference to discuss a number of issues about the hearing. The pre-hearing conference was held on August 9, 2010, and the parties agreed to use the September 2010 dates for mediation. At the last minute, the mediation was cancelled at the grievor's request.

[8] On November 8, 2010, the PSLRB sent a letter to the parties, informing them that the references to adjudication would be heard from May 9 to 13 and May 24 to 27, 2011. The letter stated in part as follows: “Please note that the above-noted dates are considered ‘final’. . . .”

[9] On April 17, 2011, the grievor wrote to the PSLRB and requested that the May 2011 hearings be rescheduled as the bargaining agent had withdrawn its support.

[10] The respondent replied on April 20, 2011, objecting to the postponement request. The respondent pointed out that the grievor had known since January 2011 that the bargaining agent had withdrawn its support, so it was not a surprise. In addition, five of the grievances were suspensions for which the respondent had the burden of proof. Witnesses for the respondent were being brought in from out of town, one of whom had a busy medical speciality practice and had cleared her schedule for May 9 and 10, 2011, to testify.

[11] The PSLRB wrote to the parties on April 26, 2011, stating in part as follows:

. . .

> *The request was submitted to the Adjudicator assigned to hear these matters and I am directed to inform the parties that the request for postponement is* ***denied****. The hearings will proceed as scheduled May 9 to 13 and May 24 to 27, 2011, in Ottawa. The Adjudicator has instructed the following:* “We will proceed with the disciplinary matters as the Employer bears the burden of proof. Sufficient time will be afforded to the grievor to prepare for cross-examination of each of the Employer’s witnesses.”

. . .

[Emphasis in the original]

Proof of receipt of the letter is on file with the PSLRB.

[12] The following day, April 27, 2011, the PSLRB sent a “Notice of Hearing” to the parties. It specified the date, time and location of the hearing for the six grievances. It also stated in part as follows:

. . .

> ***AND FURTHER TAKE NOTICE*** *that if you fail to attend the hearing or any continuation thereof, the Board may dispose of the matter on the evidence and representations placed at the hearing without further notice to you.*
>
> . . .
>
> [Emphasis in the original]

Proof of receipt of the notice is on file with the PSLRB.

[13] The hearing was to commence on May 9, 2011, at 09:30, but, at that time, the grievor was not present. In fact, no one representing him was in the hearing room when the hearing was to proceed. The respondent and its witnesses were present, but the grievor was not. The respondent asked that the grievances be dismissed, but that request was denied because the respondent had the burden of proof with respect to the disciplinary grievances, and the grievances had not been withdrawn. The respondent stated that it was prepared to call its witnesses.

[14] I stated that I would wait to see if the grievor, or a representative, would arrive, albeit late. An attempt was made to contact the grievor at his workplace, but he did not answer. A PSLRB officer left him a message that the other party was waiting to proceed with the hearing. The grievor never returned the telephone call.

[15] At 11:00, with still no word from the grievor, I ruled that the hearing would proceed without him and that the respondent would be put to the test.

[16] Counsel for the respondent tabled a book of exhibits containing 41 tabs (Exhibit E-1) and requested at the hearing that it be sealed.

[17] On July 8, 2011 the Board wrote to the parties requesting further submissions solely on the issue of sealing this exhibit. In particular the Board asked the parties to address this issue in the context of the *Dagenais/Mentuck* test. The respondent replied on July 28, 2011 giving its reasons why the exhibit should be sealed in its entirety, or at least in part.

[18] Dr. Yarney responded on August 1, 2011 objecting to the fact the hearing was held without him and asking that he be given the opportunity to be heard. In addition, Dr. Yarney requested that the Board re-open file 566-02-2182. This file was a seventh

grievance filed by Dr. Yarney and alleges harassment and racial discrimination. It was referred to adjudication with the support of his bargaining agent. When his bargaining agent withdrew its support of this grievance, the file was closed on March 18, 2011 with written notice to Dr. Yarney. No further correspondence or exchanges with respect to this file took place once it was closed until Dr. Yarney's letter of August 1, 2011 was received. Also, it should be noted that Dr. Yarney did not address the issue of the sealing of Exhibit E-1 in his letter of August 1, 2011.

[19] The respondent replied on August 10 objecting to re-opening the hearing and provided reasons. The respondent also objected to re-opening Board file 566-02-2182, and provided reasons.

[20] Dr. Yarney wrote on August 18, 2011 with respect to the issue of sealing of the exhibit, saying he had not seen the exhibit in question, therefore he was "…unable to comment on the employer's request at this time…." He indicated he could comment once he was made a part of the proceedings. The Board advised Dr. Yarney that he could view the exhibit at the Board's office if he wished, but he never made an attempt to view the document.

[21] On August 24, 2011 Dr. Yarney again wrote to the Board asking for additional time to seek legal counsel. On August 26, 2011 the Board replied, denying the request for extension of time and the re-opening of proceedings. The reasons for the denial are contained in this decision. The issue of sealing of the exhibit is also discussed in this decision.

[22] Initially seven grievances were referred to adjudication. The seventh grievance (PSLRB file 566-02-2182) was the one closed on March 18, 2011 by the PSLRB. Six grievances remained, and five are disciplinary, grieving 1-, 3-, 5-, 10- and 20-day suspensions respectively (PSLRB Files Nos. 566-02-1991, 1992, 1994, 1993 and 1995). The sixth grievance (PSLRB File No. 566-02-2862) concerns the respondent's refusal to allow the grievor to return to work. Counsel for the respondent stated that the sixth grievance was not disciplinary and that the grievor did not incur any financial penalty. For those reasons, counsel for the respondent stated that the grievance did not meet the requirements of paragraph 209(2) of the *PSLRA*, which requires a grievor to have the support of his or her bargaining agent to proceed to adjudication on matters involving the interpretation or application of the collective agreement. Since the

bargaining agent had withdrawn its support, there was no authority to refer it to adjudication. I reserved on that grievance.

II. Summary of the evidence

A. For the respondent

1. The one-day suspension

[23] In May 2006, Dr. Sohair Morgan was the manager of the Reproduction and Urology Division (RUD) in the Bureau of Metabolism, Oncology and Reproductive Sciences (BMORS) at Health Canada. Dr. Morgan reported to the director of the BMORS, Dr. Barbara Rotter. The BMORS has four divisions, of which the RUD is one and is where the grievor worked.

[24] Each division has assessment officers. The grievor was among them. Assessment officers provide recommendations or rejections of market pharmaceuticals. Assessment officers for one division may be assigned a file in another division and must work in a team setting.

[25] The grievor began working at Health Canada in 2002. On February 7, 2006, he received a letter of reprimand for his conduct at a meeting with fellow employees, his director and a company representative.

[26] Both Dr. Rotter and Dr. Morgan attempted, unsuccessfully, to meet with the grievor following the February 2006 incident to discuss the roles and responsibilities of assessment officers. On May 8, 2006, a "Letter of Instruction" was given to the grievor (Exhibit E-1, Tab 5). It detailed the procedures and instructions that he was expected to follow at work.

[27] The Letter of Instruction was issued to the grievor because of difficulties that arose with him in the workplace. It stated in part as follows:

. . .

> *Further to that objective, below are procedures and instructions which you are directed to follow, effective immediately:*

- *Comply responsibly with all instructions and directions from management in a timely and cooperative manner, consistent with your obligations as an employee, and accept management decisions respectfully. Directions from management and invitations to meetings should not require lengthy negotiations or debate;*

- *Respect the chain of command by addressing work matters first within your division with me and subsequently, if necessary, with the Director of the Bureau. Even in cases of significant differences of opinion, particularly those regarding science or regulatory matters, you need to respect the managerial hierarchy;*

- *Keep your manager regularly and pro-actively advised of progress on your work and respect all related deadlines set by management for your work;*

- *Communicate only as authorized to obtain information to undertake reviews or to acquire information required for the work of the Bureau, but refrain from inappropriate comments or from communication to the public, or industry or outside the Bureau without consultation with your manager or the Director;*

- *Work in a co-operative and collegial manner with your colleagues, respect their input, and share your expertise and assistance in a timely manner;*

- *Check your email regularly throughout the day, respond in a timely manner to emails from management or your colleagues and when sending any email related to your duties or position at Health Canada;*

- *Organize your work to facilitate the success of the team as a whole and organize your work efficiently to meet deadlines consistently and regularly and to facilitate the efforts of your colleagues and the companies to undertake their work in a timely way including sending out clarifaxes early in the process of reviewing submissions;*

- *Present work and recommendations to the manager early enough to permit sufficient time for full discussion to resolve outstanding issues;*

- *Effective immediately, your attendance at any Grand Rounds must be preauthorized by your manager. It is expected you will only attend those that are the most relevant, provided that your attendance does not interfere with your other work priorities;*

- *Effective immediately, you will commence work at 09:00 – 17:00, Monday to Friday, to facilitate supervision of your work. Modifications of these hours of work may be made if agreed to by your supervisor. You will make yourself available for all meetings when scheduled;*

- *You will respect your hours of work and during working hours, notify your manager in advance, of all absences from the office and indicate the duration of your absence via e-mail or voice-mail. In the absence of your manager please advise the Director's office;*

- *Any annual leave must be preauthorized. Absences due to illness must be entered into ILAM within 2 days of your return to the office and supported with a medical certificate. The necessity for providing a medical certificate will be revisited in two months;*

- *You will undertake learning activities to be identified by management to facilitate your interpersonal skills and improve your ability to function as a co-operative team member in the Bureau.*

. . .

[28] Assessment officers are required to meet periodically with management to provide an update about the files that they are working on. One such meeting was scheduled with the grievor for June 19, 2006. Attending that meeting were the grievor, Dr. Morgan, Dr. Sylvie Lefebvre (another division manager with the BMORS) and Tahnya Rizvi (a project manager for the BMORS).

[29] At the meeting, Dr. Lefebvre asked the grievor what deficiencies, if any, he had seen with a particular file and how much more time was required to complete the assessment. The grievor did not want to comment on the submissions, as he felt that his opinion might be influenced. The grievor became very upset, and in response to comments made by Ms. Rizvi, he told her to "shut up" and called her a "liar." He got louder and angrier as the meeting wore on, until he stormed out. Ms. Rizvi and Dr. Lefebvre later prepared notes on what had occurred (Exhibit E-1, Tab 7).

[30] When Dr. Rotter found out about the grievor's behaviour at the meeting, she ordered that a fact-finding report be prepared (Exhibit E-1, Tab 15). She asked the grievor for his comments on the meeting (Exhibit E-1, Tab 9), but Dr. Rotter stated that she was never given a reason for his behaviour.

[31] Dr. Rotter received the fact-finding report, which is dated September 7, 2006, and she consulted with labour relations before deciding that a one-day suspension was appropriate. She issued the disciplinary letter on November 30, 2006 (Exhibit E-2), after granting the grievor three extensions to respond to the fact-finding report. The grievor never commented. The suspension letter stated in part as follows:

. . .

> *I have considered all the facts before me as well as any possible mitigating factors which may have given rise to your behaviour, I however am unable to find anything to excuse your conduct. I find that your behaviour towards Ms. Rizvi was disrespectful and is therefore considered a wilful act of misconduct. You have failed to acknowledge that your behaviour was inappropriate, nor have you shown any remorse for your actions.*
>
> *Your behaviour is also in contravention of the Principles of the Health Canada Code of Conduct which reads as follows:*
>
> *"Principles.*
>
> *Carry out their work in a manner that is consistent with the* Values and Ethics Code for the Public Service *and the* Health Canada Code of Conduct.
>
> *Contribute to a respectful and professional workplace.*
>
> *Conduct themselves in a professional manner."*

2. <u>The three-day suspension</u>

[32] On March 16, 2007, the respondent issued a three-day suspension to the grievor, stating in part as follows (Exhibit E-7):

. . .

> *During our meeting we discussed your requests to postpone the meetings of January 8 and 18, 2007 without adequate notice, your failure to provide a medical certificate for your absence of January 11, 2007 within 2 days of your return to work on January 15, 2007, your e-mail messages of January 18, 2007 that did not respect the chain of command, and your failure to lower your voice during the January 18, 2007 meeting to discuss your semi-annual PDP.*

> *During our meeting you did not provide any explanation for your behaviour. You were also given an opportunity to provide comments in writing, but no comments have been received.*
>
> *You were made fully aware of our expectations with respect to your conduct in the workplace when you were issued a Letter of Instruction dated May 8, 2006. In addition on February 7, 2006 you were issued a letter of reprimand regarding your conduct during a meeting with a sponsor and Health Canada officials. On November 30, 2006 you were awarded a one-day suspension for treating a colleague in a disrespectful manner.*
>
> *I have considered all the facts before me as well as any possible mitigating factors which may have caused your behaviour. I can find no excuse for your conduct. I find that you have willfully failed to respect the letter of instruction in relation to the scheduling of meetings, the provision of medical certificates in a timely manner, respect of the chain of command, and respect of your managers. You have failed to acknowledge that your behaviour was inappropriate, nor have you shown any remorse for your actions.*

. . .

[33] Dr. Céline Desjardins was acting manager of the RUD in December 2006. She attempted to meet with the grievor for his "Performance Discussion Process" (PDP), which is typically an annual performance review. Dr. Desjardins testified that it was difficult to meet annually with the grievor, so she attempted semi-annual meetings to discuss his work. The Letter of Instruction (Exhibit E-1, Tab 5) that the grievor received stated that his performance and work conduct would be reviewed each month, but Dr. Desjardins testified that the best she was able to do was to attempt to meet with him semi-annually.

[34] Dr. Desjardins scheduled the semi-annual PDP review for January 8, 2007.

[35] That meeting was postponed when the grievor asked that an independent witness attend. The meeting was rescheduled for January 11, 2007, but was postponed again due to the grievor being ill that day. The meeting was rescheduled for January 18, 2007, and the grievor attended.

[36] Dr. Desjardins testified that the meeting was very short. The grievor entered the room but did not sit down. When asked to sit, he started to yell, and when asked to lower his voice, he said that it was in his culture to yell and then left the room.

[37] Dr. Desjardins then emailed the grievor, stating that he could comment on the draft PDP in writing, but no comments were ever received.

[38] The grievor copied senior management (including the Director General) in emails he sent to Dr. Desjardins before and after the January 18, 2007 meeting, despite clear instructions in the Letter of Instruction to follow the chain of command (Exhibit E-1, Tab 18).

[39] With respect to the grievor's illness on January 11, 2007, he was required to submit a medical certificate within two days of his return to work, as outlined in his Letter of Instruction (Exhibit E-1, Tab 5). He did not comply, and that, together with the postponements and his conduct at the January 18, 2007 meeting, were the subject of a disciplinary hearing held on February 12, 2007 (Exhibit E-1, Tab 19).

[40] The grievor attended the disciplinary hearing but offered no apology for his behaviour.

3. <u>The five-day suspension</u>

[41] About four months after the three-day suspension was issued, Dr. Rotter issued a five-day suspension to the grievor. In her disciplinary letter of July 18, 2007, Dr. Rotter wrote in part as follows (Exhibit E-3):

> . . .
>
> *During the meeting the following issues were discussed:*
>
> - *your reasons for not attending the meeting of February 27, 2007;*
> - *your failure to respond to the invitation to attend a disciplinary hearing scheduled for March 16, 2007;*
> - *your failure to attend the disciplinary meeting;*
> - *your failure to respect the chain of command by forwarding, on March 15, 2007, the disciplinary hearing reminder to Dr. Supriya Sharma;*
> - *After claiming it was medically inappropriate for you to attend meetings scheduled on March 16 and 27, 2007, you were requested by letter dated April 11, 2007, to provide medical certification, which you failed to provide by mentioning that the letter was "under consideration, but as to when a response, if any, will be forthcoming, is presently unknown."*
> - *your failure to meet with Mary Raphael on April 25, 2007; and*

> - *your failure to provide a response to Barbara Rotter by April 30, 2007.*
>
> *You were made fully aware of our expectations with respect to your conduct in the workplace when you were issued a letter of instruction dated May 8, 2006. In addition on February 7, 2006 you were issued a letter of reprimand regarding your conduct during a meeting with a sponsor and Health Canada officials. On November 30, 2006 you were awarded a one-day suspension for treating a colleague in a disrespectful manner. Furthermore, on March 16, 2007, you were also awarded a 3 day suspension for your failure to respect the letter of instruction in relation to the scheduling of meetings, the provision of medical certificates in a timely manner, respect of the chain of command, and respect of your managers.*
>
> *During the meeting you provided some explanation for your behaviour. I have considered all the facts before me as well as any possible mitigating factors which may have caused your behaviour. As a mitigating factor, I did consider that the February 27 meeting was rescheduled twice and subsequently cancelled. However, I find that you have willfully failed to respect the letter of instruction in relation to the scheduling of meetings, the respect of the chain of command and respect of your managers. You have failed to acknowledge that your behaviour was inappropriate, nor have you shown any remorse for your actions.*

. . .

[42] On February 14, 2007, Dr. Desjardins sent the grievor a letter and attached a work plan for the period ending March 31, 2007, as well as a copy of the grievor's final semi-annual PDP (Exhibit E-1, Tab 22). Dr. Desjardins proposed that they meet on February 27, 2007 to discuss both issues, but she could not recall whether the grievor attended.

[43] The associate director of the BMORS, Mary Raphael, emailed the grievor, stating that a disciplinary hearing was to be held on March 16, 2007, to discuss a number of issues (Exhibit E-1, Tab 26). The grievor was asked to confirm his attendance by March 13, 2007, but by March 15, 2007, he had not done so. Consequently, Ms. Raphael followed up, informing the grievor that things would proceed as planned. The grievor then responded, objecting to "the accusations" and stating as follows (Exhibit E-1, Tab 26): "Furthermore it would presently be medically inappropriate for me to engage in such an exercise."

[44] Ms. Raphael then emailed the grievor April 11, 2007, and attached ". . . two letters requesting the identification of any medically-based restrictions or limitations on your participation in meetings" (Exhibit E-1, Tab 27). A reply was requested by April 17, 2007.

[45] The grievor did not respond, and Ms. Raphael sent a follow-up email on April 23, 2007, stating in part as follows (Exhibit E-1, Tab 27): "If I have received no response by 4:00 p.m. on April 24, 2007 I will assume that there are no medically-based restrictions on your participation in work-related meetings."

[46] The grievor replied on April 23, 2007, stating as follows (Exhibit E-1, Tab 27): "This acknowledges the receipt of your letter. The letter is under consideration but as to when a response, if any, will be forthcoming, is presently unknown. I shall notify you as soon as I have something concrete to share."

[47] Ms. Raphael testified that the grievor never responded to the April 23, 2007, email.

[48] A disciplinary meeting was scheduled for May 15, 2007, to discuss the points raised in the letter of discipline (Exhibit E-3). The grievor attended the meeting, but Ms. Raphael testified that he did not provide satisfactory explanations for each item raised in the disciplinary letter.

4. <u>The 10-day suspension</u>

[49] The grievor next received a 10-day suspension. The letter of discipline was issued on September 14, 2007, and states in part as follows (Exhibit E-4):

. . .

> *This is further to the disciplinary meeting of August 29, 2007 during which you were accompanied by Bruce Bolton and Sohair Morgan was accompanied by Isabelle Sakkal.*
>
> *During the meeting were discussed the following issues:*
>
> - *your failure to respond to the invitation to attend the PDP meeting by June 8, 2007;*
> - *your reasons for not attending the PDP meeting of June 12, 2007;*

> - *your failure to provide details as to why you could not attend the PDP meeting and what accommodation measures were sought;*
> - *Your failure to submit a revise* [*sic*] *claim for your travel expense for the CSSAM conference;*
> - *Correspondence to Nancy Beer regarding your travel claim.*
>
> *You were made fully aware of our expectations with respect to your conduct in the workplace when you were issued a letter of instruction dated May 8, 2006. In addition on February 7, 2006 you were issued a letter of reprimand regarding your conduct during a meeting with a sponsor and Health Canada officials. On November 30, 2006 you were awarded a one-day suspension for treating a colleague in a disrespectful manner. Furthermore, on March 16, 2007, you were also awarded a 3 day suspension for your failure to respect the letter of instruction in relation to the scheduling of meetings, the provision of medical certificates in a timely manner, respect of the chain of command, and respect of your managers. Most recently, you were awarded a 5 day suspension for having again wilfully failed to respect the letter of instruction in relation to the scheduling of meetings, the respect of the chain of command and respect of your managers.*
>
> *I have considered all the facts before me as well as any possible mitigating factors which may have caused your behaviour. I can find no excuse for your conduct. I find that you have wilfully failed to respect the letter of instruction in relation to the scheduling of meetings, accepting management decisions, your obligation to comply to* [*sic*] *instructions from management, your duty to communicate respectfully and the respect of your managers. You have failed to acknowledge that your behaviour was inappropriate, nor have you shown any remorse for your actions.*

. . .

[50] The annual PDP meetings with employees were scheduled for June 2007 to discuss the 2006-2007 PDP. Dr. Desjardins told the grievor that his meeting was scheduled for June 12, 2007, from 15:15 to 15:45, and he was asked to respond to confirm his availability. By June 7, 2007, he did not respond, so Dr. Desjardins sent a follow-up email on June 7, 2007 (Exhibit E-1, Tab 29), asking for a response by June 8, 2007.

[51] The grievor had two supervisors in 2006-2007, Dr. Desjardins and Dr. Morgan. As both had supervised the grievor, both attended the PDP meeting. On June 11, 2007,

the grievor wrote to Dr. Morgan, stating that he was "... categorically unable to attend a PDP meeting with Dr. Desjardins in attendance" (Exhibit E-1, Tab 30). Dr. Morgan replied, stating that "... the meeting will proceed as scheduled" (Exhibit E-1, Tab 30).

[52] The grievor did not show up for the meeting (Exhibit E-1, Tab 30).

[53] The travel expense claim issue, raised in the September 14, 2007 suspension letter, arose from the grievor's request to attend a conference in February 2007.

[54] In late 2006, Dr. Desjardins requested that assessment officers put together their conference attendance plans for the 2007-2008 fiscal year. The grievor requested to attend a conference in February 2007, which was within the 2006-2007 fiscal year. Attendance at that conference was not budgeted within the 2006-2007 fiscal year, and Dr. Desjardins informed the grievor that his participation at that conference would not be authorized (Exhibit E-1, Tab 17).

[55] The grievor then requested annual leave that coincided with the conference. Dr. Desjardins replied, stating that, before issuing the approval, she wanted to confirm that submission targets on his files would be met. The grievor then wrote back to Dr. Desjardins, copying the Assistant Deputy Minister, the Director General and other senior officials, expressing his concern about the disapproval of his request.

[56] Dr. Desjardins stated that it was not expected that an employee would copy senior management with daily work issues and that that behaviour showed the grievor could not respect the chain of command.

[57] The Director General (Dr. Rotter) agreed that the grievor would attend the conference and that he would be reimbursed the registration fee of $350.00. Both the grievor and Dr. Rotter signed the travel authority form specifying the reimbursement (Exhibit E-1, Tab 23). The grievor then wrote back to Dr. Rotter, stating that the registration cost had risen due to the late registration and he was now asking for more funds. Dr. Rotter replied, stating that "the amount of $350 remains" (Exhibit E-1, Tab 23).

[58] When the grievor returned from the conference, he submitted a travel expense claim form for $578.88 (Exhibit E-1, Tab 33) which included a registration fee of $475.00 plus train transportation of $103.88. Both amounts had been charged to a departmental credit card. The form was not approved.

[59] Dr. Desjardins stated that she had a difficult time helping the grievor understand that the approval was for $350.00 for the conference. In fact, the grievor never submitted a revised claim form, and Dr. Rotter had to amend it to request $350.00. Counsel for the respondent introduced numerous emails from a number of people sent to the grievor about his travel claim before it was amended for him. (Exhibits E-1, Tab 32 and Tab 33). Included was one from the departmental travel contact, Nancy Beer, informing the grievor that his departmental credit card was overdue (Exhibit E-1, Tab 33). The grievor replied, stating in part as follows: "The amount at issue . . . is the registration fee for the. . . approved conference, which as you know was approved February 6, 2007" (Exhibit E-1, Tab 33).

[60] Dr. Rotter issued the suspension due to the amount of time wasted trying to correct the travel claim and because the grievor attempted to mislead Ms. Beer by giving her an unauthorized travel claim. In addition, he did not show up for his scheduled PDP meeting on June 12, 2007. Dr. Rotter kept the grievor's disciplinary record in mind and was aware of the attempts to correct what was considered inappropriate behaviour. The grievor did not provide the employer with any information about the inappropriate behaviour.

5. <u>The 20-day suspension</u>

[61] The last disciplinary grievance is about a 20-day suspension issued to the grievor on January 2, 2008 (Exhibit E-6). The letter states in part as follows:

> . . .
>
> *This is further to the disciplinary meeting of December 6, 2007 during which you were accompanied by Michel Paquette and Barbara Stephens was accompanied by Sohair Morgan and Susan Dibble.*
>
> *During the meeting you were provided with an opportunity to respond to the following incidents:*
>
> - *On September 13, 2007, during a meeting with Sohair Morgan and Barbara Stephens to discuss your workload, your conduct was unacceptable and disrespectful towards Dr. Morgan. You raised your voice and repeatedly told Dr. Morgan that she was negligent despite several requests from Barbara Stephens to lower your voice and her warning that it is unacceptable to call your manager negligent. You continued to treat*

> *Dr. Morgan with disrespect and failed to provide the requested information.*
>
> - *You were requested to attend a meeting scheduled for September 25, 2007. You informed Barbara Stephens by e-mail date September 24, 2007 that you would not be able to attend because of a medical appointment but would return to the office at 12:00 noon. You were notified by e-mail that the meeting was re-scheduled for 1:00 p.m. in order to accommodate your medical appointment. A hard copy of the e-mail was placed on your desk prior to your departure. Barbara Stephens also attempted to hand deliver a copy of the e-mail to you prior to your leaving the office. You refused to take the copy but stated that you would be back. You did not return to the office for the remainder of the day nor did you advise your manager that you would not return.*
>
> *At the meeting on December 6, 2007 you provided a package to Barbara Stephens. This package was your written response for the disciplinary investigation. It was addressed to Meena Ballantyne and to me. I have carefully reviewed the material you provided. In your response, you stated that your comments* [*sic*] *that Dr. Morgan was negligent was not abusive, but a statement of fact. Furthermore, you have not provided an explanation for your disrespectful behaviour during the meeting of September 13, 2007. Nor did you provide a satisfactory explanation for your failure to return to the office or your failure to communicate to your manager that, contrary to your commitment to do so, you would not return to the office on the afternoon of September 25, 2007.*

. . .

[62] On September 13, 2007, a meeting was convened to discuss the grievor's workload. Attending were the grievor, Dr. Morgan and Associate Director Barbara Stephens. Dr. Morgan testified that those meetings were required of all assessment officers so that they could provide status updates of their files. The grievor had three files. Dr. Morgan wanted to know the status of each file, the remaining work on each and the completion dates. The grievor had been advised about the meeting's purpose (Exhibit E-1, Tab 36).

[63] Dr. Morgan testified that the grievor attended the meeting but that he initially refused to answer questions. Then the grievor began yelling at Dr. Morgan. Ms. Stephens interrupted and informed the grievor that it was disrespectful to speak to his manager that way. The meeting was then ended.

[64] As a result, a fact-finding meeting was scheduled for September 25, 2007, to allow the grievor an opportunity to present any relevant facts (Exhibit E-1, Tab 38, page 8).

[65] On September 24, 2007, the grievor asked that the meeting be postponed so that he could have a bargaining agent representative attend. He was informed that his bargaining agent representative was willing to attend. The meeting was scheduled for September 25, 2007, at 13:00 (Exhibit E-1, Tab 38, page 7).

[66] Later that same day, the grievor again asked that the meeting be postponed because he had ". . . . to go to the clinic for an appointment" (Exhibit E-1, Tab 38, page 5).

[67] The grievor stated that he would be back in the office at noon on September 25, 2007, so Ms. Stephens replied that the meeting would proceed at 13:00 (Exhibit E-1, Tab 38).

[68] On the morning of September 25, 2007, Ms. Stephens tried to give the grievor a hardcopy of the email that stated that the meeting would be at 13:00, but he refused to take it, saying that he would be back. However, he did not return to work on September 25, 2007 (Exhibit E-1, Tab 38).

[69] After 6 attempts at scheduling a disciplinary meeting, one was eventually convened in December 2007. The grievor attended. Also attending was the Director General, Therapeutic Products Division, Dr. Supriya Sharma, who ultimately issued the 20-day letter of suspension. The grievor submitted a written response to the incidents that occurred during the September 13, 2007 meeting, as well as his failure to attend the September 25, 2007 meeting. Dr. Sharma considered them but noted that there was no acknowledgement that the grievor's actions were contrary to the Letter of Instruction (Exhibit E-1, Tab 5). No mitigating factors were presented for consideration when determining the appropriate penalty.

[70] Dr. Sharma consulted with labour relations and a suspension of 20 days was deemed appropriate, applying the principles of progressive discipline.

[71] With respect to PSLRB File No. 566-02-2862, on January 25, 2008, Dr. Rotter sent the grievor a letter (Exhibit E-1, Tab 5). She wrote that his behaviour had raised concerns with his managers and co-workers. She also wrote as follows: "In order for us

to ensure that we respect any medically based restrictions or limitations that you may have in relation to attendance in the workplace, we require some information from your attending physician." A letter addressed to the grievor's physician was attached. It posed five questions and requested responses.

[72] When the letter was sent to the grievor, he was serving his 20-day suspension, which ran from January 2 to 30, 2008.

[73] Following the expiry of the grievor's suspension, Dr. Rotter testified that he was placed on one of the following: sick leave, annual leave or leave with pay. Apart from the suspension, the grievor was not without pay.

[74] The paid leave continued for more than four months, after which the grievor returned to work.

III. Summary of the arguments

A. For the respondent

[75] The respondent submitted a written argument, which I will summarize.

[76] Five of these grievances concern suspensions of 1, 3, 5, 10 and 20 days, respectively.

[77] The one-day suspension was imposed for the grievor's behaviour at a meeting on June 19, 2006. It was a standard meeting and was the third attempt to obtain the necessary updates from the grievor. At the meeting, the grievor became very angry and called the project manager a liar. He yelled.

[78] The three-day suspension was imposed for incidents that took place in January 2007. The grievor's supervisor, Dr. Desjardins, was attempting to meet with him to discuss his PDP. Meetings were set for January 8 and 18, 2007, and the grievor asked at the last minute that they be postponed or delayed. On January 11, 2007, the grievor called in sick and did not provide a medical certificate within 48 hours, as required by the Letter of Instruction. The grievor met with Dr. Desjardins on January 18, 2007, but refused to sit down and yelled at those participating in the meeting. In addition, in a number of emails that he sent on January 18, 2007, he copied senior management, which was not appropriate.

[79] The five-day suspension was imposed for the grievor's failure to attend a meeting scheduled for February 27, 2007, about his job performance. He later stated that he thought that the meeting was optional, but Ms. Raphael discounted that statement because he had been sent emails requesting that he attend. In addition, a disciplinary hearing was scheduled for March 16, 2007, and the grievor did not respond that he would attend. Instead, he forwarded the meeting request to Dr. Sharma and wrote that it was medically inappropriate for him to attend. He was then given a letter for his doctor to provide any medically based restrictions, but the grievor never responded to that request.

[80] The 10-day suspension was imposed for his refusal to cooperate with attempts to schedule a PDP meeting in June 2007. A request sent to him to attend asked for a reply by June 8, 2007. He did not respond by that date; nor did he attend the meeting. In addition, he submitted a travel claim form for an amount in excess of what had been pre-approved. He misled the travel claims coordinator by submitting an unauthorized form.

[81] The 20-day suspension was imposed for the grievor's conduct during a meeting held on September 13, 2007, with his supervisor, Dr. Morgan, and a witness, Ms. Stephens. During the meeting, the grievor yelled at his supervisor and refused to respond to questions. Ms. Stephens told him that it was not appropriate to speak to a supervisor in that tone, and the meeting ended. A fact-finding meeting was scheduled for September 25, 2007, at 13:00, to accommodate a medical appointment the grievor had that morning. The grievor refused to accept a hardcopy of the email scheduling the meeting, and he did not show up for the 13:00 meeting. He never provided a reason for not attending.

[82] His actions throughout all the discipline were contrary to the Letter of Instruction, and the principle of progressive discipline was applied to each incident.

[83] With respect to PSLRB File No. 566-02-2862, the grievor suffered no financial loss. It is not adjudicable. The January 25, 2008 letter issued to the grievor was not disciplinary in nature and was issued in response to concerns about his behaviour in the workplace.

IV. <u>Reasons</u>

[84] The PSLRB scheduled these grievances for mediation and for adjudication on a number of different occasions, only to have them postponed for a variety of reasons. Ultimately, on November 8, 2010, the PSLRB sent a letter to both the respondent and the bargaining agent, informing them that the matter was scheduled for a hearing from May 9 to 13 and May 24 to 27, 2011. The letter informed the parties that the dates were to be considered "final."

[85] On April 17, 2011, the grievor wrote to the PSLRB and asked that the May 2011 hearing dates be postponed due to ". . . the sudden and complete withdrawal of representation."

[86] The respondent replied on April 20, 2011, stating that it did not agree with the postponement request and that the grievor knew in January 2011 that his bargaining agent was withdrawing its support. Additionally, the respondent has the burden of proof in discipline cases. Its witnesses had made all the arrangements to appear, including a medical doctor from out of town (a former supervisor of the grievor) who had cleared her calendar.

[87] The PSLRB wrote to the parties on April 26, 2011, stating in part as follows:

> . . .
>
> *The request was submitted to the Adjudicator assigned to hear these matters and I am directed to inform the parties that the request for postponement is **denied**. The hearings will proceed as scheduled May 9 to 13 and May 24 to 27, 2011, in Ottawa. The Adjudicator has instructed the following:* "We will proceed with the disciplinary matters as the Employer bears the burden of proof. Sufficient time will be afforded to the grievor to prepare for cross-examination of each of the Employer's witnesses."
>
> . . .
>
> [Emphasis in the original]

The grievor' signature, showing that he received the letter, is on file.

[88] On April 27, 2011, the PSLRB sent a Notice of Hearing to the parties indicating the date, time and location of the hearing. It stated in part as follows:

> . . .
>
> ***AND FURTHER TAKE NOTICE*** *that if you fail to attend the hearing or any continuation thereof, the Board may dispose of the mater* [sic] *on the evidence and representations placed at the hearing without further notice to you.*
>
> . . .
>
> [Emphasis in the original]

Again, the grievor's signature, showing that he received the Notice of Hearing, is on file.

[89] The grievor was not present when the hearing began. In fact, no one was present on his behalf. The respondent and its witnesses were all present. The respondent requested that the grievances be dismissed; however, I indicated that I would wait to see if the grievor was simply late. An attempt was made to contact the grievor at his office. He did not answer, so a voicemail was left indicating that the parties were waiting in the hearing room.

[90] At 11:00, the grievor still had not responded, so I ruled that the hearing would proceed and that the respondent would be put to the test in the five disciplinary grievances since it had the burden of proof, given that disciplinary matters were at issue.

[91] The grievor's absence and the subsequent request for dismissal by the respondent were similar to the situation in *Saini v. Treasury Board (Revenue Canada - Customs and Excise)*, PSSRB File Nos. 166-02-17097 and 17098 (19881220). At pages 10 and 11, the adjudicator wrote as follows:

> . . .
>
> *On November 14, 1988, the undersigned adjudicator attended at the continuation of the hearing. Neither the grievor nor his counsel appeared. Counsel for the employer made a motion that both grievances be dismissed without any further delay. I ruled against her motion, stating that the grievances had not been withdrawn by the grievor, and*

> *that her client still had the burden of proof as this was a disciplinary matter. The hearing continued in the absence of the grievor and his counsel. . . .*
>
> . . .
>
> *The grievor was clearly advised that this hearing would continue on November 14, 1988. I am satisfied that the grievor had ample time to retain and instruct counsel or to make preparations to appear on his own behalf. In the absence of any convincing reason as to why the hearing should not proceed, I can only conclude, in the circumstances, that the grievor had no intention of attending the hearing, either by himself or through a representative.*
>
> *It is in view of all the above that I decided to continue the hearing, notwithstanding the absence of the grievor or his representative.*
>
> . . .

[92] In the same fashion, Dr. Yarney was clearly advised that the hearing would proceed from May 9 to 13 and May 24 to 27, 2011. He was also clearly advised that the matter could proceed without him if he did not show up. I was not provided with any convincing reason that the hearing should not continue. As in *Saini*, I also concluded that the grievor had no intention of attending the hearing, so I instructed the respondent to proceed with its case.

[93] Five of the six grievances are about a series of suspensions levied against the grievor for a variety of work-related occurrences. The foundation for the suspensions was the Letter of Instruction (Exhibit E-1, Tab 5), which outlined the procedures and instructions that he was expected to follow.

[94] The question that must be answered is the following: has the respondent met its burden of proof and established that it was justified in suspending the grievor for the periods of time that it has right to suspend and length of suspensions are both at issue? For the reasons that follow, I believe that it has.

[95] The evidence clearly showed that the grievor was loud and angry at a meeting held on June 19, 2006. He was yelling, and when asked not to yell, he continued. Such decorum is not expected in the workplace; nor should it be tolerated. The meeting was about a request to receive updates on files on which the grievor was working. The evidence indicated that this is a routine request, if managers need to be kept up to

date on files their employees are working on. The grievor's reaction to the request was, in my view, out of line. Courteous behaviour should be the norm in the grievor's professional workplace.

[96] A one-day suspension for that proven offence is, in my view, justified.

[97] Seven months later, on January 18, 2007, at a meeting to discuss the grievor's PDP, he yelled again at his supervisor, to the extent that the parties were not able to discuss his performance issues. In addition, the grievor did not provide a medical certificate within 48 hours of an absence due to illness on January 11, 2007, in violation of the Letter of Instruction.

[98] The respondent felt that other elements warranted a three-day suspension, but in my view, those two alone are sufficient to invoke progressive discipline. Yelling at one's supervisor to the extent that performance updates cannot be discussed is no way to conduct oneself in a work environment such as the grievor's. A reasonable request to meet and discuss work progress should not be met with such a response. Nor was I presented with any valid reason that a medical certificate could not have been produced within 48 hours, as the Letter of Instruction required.

[99] The five-day suspension was imposed for a variety of occurrences, as outlined in Dr. Rotter's disciplinary letter of July 18, 2007 (Exhibit E-3). In my view, its allegations have also been proven, and since the principle of progressive discipline was applied, I see no reason to alter the five-day suspension.

[100] The 10-day suspension, once again, was imposed for issues surrounding the grievor's PDP. An added element was an issue about a travel claim submitted by the grievor. Again, I believe that the respondent has discharged its burden of proof and has showed that the grievor did not attend the scheduled PDP meeting and that he failed to revise his travel claim. I see no reason to alter the 10-day suspension.

[101] Similarly, for the 20-day suspension, I believe that the evidence shows that the respondent has met its burden of proof to demonstrate that the events as outlined in the disciplinary letter of January 2, 2008 (Exhibit E-6) took place. Again, a meeting was held on September 13, 2007, to discuss the files that the grievor was working on. Again, he began yelling at his supervisor and refused to answer questions put to him. The meeting had to be terminated.

[102] In spite of the disciplinary action taken against the grievor for the same type of disrespectful behaviour in the past, he continued to demonstrate disrespect for his supervisor. That behaviour should not be tolerated, and the principle of progressive discipline led management to impose a 20-day suspension on the grievor. I see no reason to modify it.

[103] With respect to PSLRB File No. 566-02-2862, the grievor does not have the support of his bargaining agent. That means that that grievance, to be adjudicable, could not fall under paragraph 209(1)(*a*) of the *PSLRA*. Section 209 reads in part as follows:

> ***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 or an arbitral award;*
>
> (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.*
>
> . . .

[104] Subsection 209(2) of the *PSLRA* requires that the bargaining agent represent an employee at adjudication if the matter pertains to the interpretation or application of a provision of a collective agreement under paragraph 209(1)(*a*). In this case, the bargaining agent withdrew its support, so the grievance cannot pertain to paragraph 209(1)(*a*) and be adjudicable.

[105] Paragraph 209(1)(*b*) of the *PSLRA* requires the grieving of some type of disciplinary action that resulted in termination, demotion, suspension or financial penalty for the grievance to be adjudicable. Dr. Rotter testified that none of those events took place after the letter of January 25, 2008 was issued, which the grievor

grieved. Therefore, absent evidence to the contrary, I have no jurisdiction to hear the grievance in PSLRB File No. 566-02-2862 under paragraph 209(1)(*b*).

[106] With respect to the employer's request that Exhibit E-1 be sealed, the issue pits the public's right to know against the prevention of serious harm to one of the parties. This issue was canvassed in *Tipple v. Deputy Head (Department of Public Works and Government Services)* 2009 PSLRB 110, at paragraphs 13-15:

> ***13.*** *In exercising his or her discretion, an adjudicator must act within the boundaries set by the* Charter*. As the Supreme Court of Canada found in* Toronto Star Newspapers Ltd.*, such boundaries, known as the* Dagenais/Mentuck *test, apply with regard to public access to legal proceedings. At paragraphs 4, 5 and 7, the Court wrote the following:*
>
> . . .
>
> ***4.*** *Competing claims related to court proceedings necessarily involve an exercise in judicial discretion. It is now well established that court proceedings are presumptively "open" in Canada. Public access will be barred only when the appropriate court, in the exercise of its discretion, concludes that disclosure would subvert the ends of justice or unduly impair its proper administration.*
>
> ***5.*** *This criterion has come to be known as the Dagenais/Mentuck test, after the decisions of this Court in which the governing principles were established and refined…*
>
> . . .
>
> ***7.*** *… In my view, the Dagenais/Mentuck test applies to all discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings. Any other conclusion appears to me inconsistent with an unbroken line of authority in this Court over the past two decades. And it would tend to undermine the open court principle inextricably incorporated into the core values of s. 2(b) of the Charter.*
>
> *[Emphasis in the original]*
>
> **14.** In *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, the Supreme Court of Canada had reformulated the *Dagenais/Mentuck* test as follows:
>
> . . .

> *(a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and*
>
> *(b) the salutary effects of the … order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.*
>
> . . .
>
> *In this case, however, the second part of the Dagenais/Mentuck test has no practical application, as the deputy head has not alleged that the right to information protected by the Charter interferes with another important right or interest requiring protection.*
>
> ***15.*** *The party seeking to restrict the public's access to these proceedings bears the burden of establishing the legitimacy of the limitation sought: MacIntyre. For the purpose of this decision, the deputy head must provide a sufficient evidentiary basis to establish that not granting access to the exhibits until I render a final decision on the merits of the grievance is necessary in order to prevent a serious risk to an important interest in the context of adjudication. It has produced no evidence to that effect or alluded to any risk of that kind.*

[107] Has the employer demonstrated that, in this case, the sealing of portions of Exhibit E-1 is necessary to protect a commercial interest? I believe it has. In its letter of July 28, 2011 to the Board at pages 2-3, the employer states: "…it is necessary that third party pharmaceutical companies, in approaching Health Canada for approval, remain assured that their proprietary information will be treated in confidence. If there were a risk of disclosure of this information, there would be serious jeopardy to the commercial operations of Health Canada and to the third party commercial interests. As well, there would be a reasonable expectation of prejudice to the competitive position of such third party. Further, anything that undermines the confidence that exists for the pharmaceutical approval process has the potential to place the health and safety of Canadians at risk."

[108] The employer requested the sealing, or partial redaction of Exhibit E-1 and I am of the view this request conforms to what the Supreme Court wrote in *Sierra Club* where it stated "such an order is necessary in order to prevent serious risk to an

important interest, including a commercial interest…" There is no doubt that a serious commercial interest is at stake here as pharmaceutical companies seek to protect their proprietary information. I am of the view that the employer has met the *Dagenais/Mentuck* test.

[109] The employer admits that not all of Exhibit E-1 needs to be sealed but requests that a Health Canada official meet with a Board representative to review the exhibit and redact certain portions. I see nothing wrong with this request and it will ensure the proprietary interests of the various companies remains protected. The redaction will be done in accordance with the submission of the employer dated July 28, 2011.

[110] With respect to Dr. Yarney's request to re-open file 566-2-2182, his request was denied by the Board and I am without jurisdiction to accede to his request even were I to find that his request is well-founded, which I do not. I am not seized of file 2182 and am therefore without jurisdiction to consider it. Also, Dr. Yarney was advised in writing of the Board's intention with regard to this file in March of 2011 and made no protest at that time. Lastly, his grievance is clearly a matter that requires the support of his bargaining agent under the terms of the *PSLRA* and he is without that support.

[111] With respect to Dr. Yarney's request to re-open the hearing, or make submissions on the issues in dispute, the time to address the issues was during the May proceedings. Dr. Yarney was provided adequate notice of the hearing and clearly told that the matter could proceed without him. He chose not to attend.

[112] In his letter to the Board dated August 1, 2011 Dr. Yarney states:

> *"…on May 9, 2011 the thought of having to relive horrible moments, and having to draw respected colleagues as witnesses through that saga was much too much for me to bear. I just couldn't handle it and not surprisingly it got me seriously ill and I was in fact ordered to stay off work for several days by my physician. This is precisely why I was unable to attend the proceedings of May 9, 2011 and thereabouts, and I hope you will accept my apology for my absence."*

[113] On August 10, 2011 the employer replied, stating at page 2:

> *On the morning of May 9th, the Adjudicator, the employer and the employer witnesses attended the hearing. The grievor did not attend, nor leave any message. There can be*

> *no doubt as to the grievor's knowledge of the relevant email contacts for the PSLRB, given his prior use of those contacts.*

[114] Inquiries made by both the PSLRB and the employer on May 9th confirmed that the grievor was present at work that morning, and that he took no initiative to contact the Board regarding his absence.

[115] Following the grievor's attendance at the workplace on the morning of May 9, he then claimed uncertified sick leave for the afternoon of May 9th (3.75 hours) as well as sick leave for May 10-11, 2011.

[116] At the date the hearing reconvened on May 24, as per the Notice of Hearing, the grievor did not contact the Board regarding his non-attendance. The employer's records indicate that the grievor was present at work on May 24, 2011.

[117] The facts contained in the employer's letter of August 10, 2011 were not refuted.

[118] It is clear to me that there is no new evidence which supports the request to re-open the hearing. The grievor was, apparently, at work on the morning that the hearing commenced and chose not to attend, or contact the Board to explain his absence. A full 14 days went by between the second and third day of the hearing and no word was received by the Board from Dr. Yarney explaining his absence. Indeed, according to the employer, Dr. Yarney chose to attend work on May 24 rather than attend the continuation of the hearing. I find his claim of being too ill to attend the hearing disingenuous given the fact he was at work on 2 of the 3 days the matter was heard. It is also wholly unsupported by any evidence. I am, therefore, not in agreement with his request to re-open the hearing.

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

(The Order appears on the next page)

V. Order

[120] The book of exhibits (Exhibit E-1) is to be partially sealed. A Health Canada official designated by the employer will attend at the Board offices to assist in determining that portions of Exhibit E-1 which need to be redacted in accordance with the *Dagenais/Mentuck* test and the terms outlined by the employer in its submissions dated July 28, 2011.

[121] The grievances in PSLRB File Nos. 566-02-1991, 1992, 1993, 1994 and 1995 are dismissed.

[122] The grievance in PSLRB File No. 566-02-2862 is dismissed.

[123] The request by the grievor to re-open the hearing is dismissed.

September 21, 2011.

Joseph W. Potter,
adjudicator