**Date:** 20110124

**File:** 566-02-2332

**Citation: 2011 PSLRB 4**

*Public Service*
*Labour Relations Act*

Before an adjudicator

BETWEEN

**JEFF SCHWARTZENBERGER**

Grievor

and

**DEPUTY HEAD**
**(Department of National Defence))**

Respondent

Indexed as
*Schwartzenberger v. Deputy Head (Department of National Defence)*

In the matter of an individual grievance referred to adjudication

**REASONS FOR DECISION**

***Before:*** John Steeves, adjudicator

***For the Grievor:*** Ray Domeij, Public Service Alliance of Canada

***For the Respondent:*** Richard Fader, counsel

Heard at Victoria, British Columbia,
September 28 and 29, 2010

## Grievance referred to adjudication

[1] This grievance is about whether the Department of National Defence ("the respondent") had just cause for imposing a two day suspension on Jeff Schwartzenberger ("the grievor") for inappropriate use of sick leave.

## Summary of the arguments

[2] The respondent submits that the grievor booked off sick in November 2005 in order to attend a hockey game. When he was first asked by the respondent about this he said he could not attend work because he drank too much alcohol the night before, while at the hockey game. During a subsequent investigation in 2006, the grievor relied on a medical condition and asserted his right to be on sick leave. The grievor was given a one day suspension in April 2006 for a violation of the *Values and Ethics Code for the Public Service* when he asked a co-worker to "step outside". The respondent submits that a two-day suspension is an appropriate disciplinary response for this second incident.

[3] The bargaining agent, the Public Service Alliance of Canada, on behalf of the grievor, submits that he had a legitimate illness for using sick leave on the date in question. The grievor's medical condition is long standing and, according to the grievor, the respondent should have known about this condition and taken it into account. An important aspect of this condition is that the grievor can anticipate the onset of this condition and that is what he did in this case. It is accepted that the grievor attended a hockey game the night before the day off on sick time but that is an activity that is compatible with the grievor's condition. By way of remedy the grievor seeks to have the two day suspension set aside and to be made whole.

## Background

[4] The respondent operates a number of bases in Canada, including Canadian Forces Base (CFB) Esquimalt, British Columbia. CFB Esquimalt includes various naval operations and a fire department staffed by civilian employees. There are four detachments of firefighters with approximately 100 employees in total. The grievor has been a firefighter at the base since May 1986. He has also held various elected positions with the bargaining agent and he is currently first vice-president of his local.

[5] In 2001, the grievor was having some difficulty interacting with his co-workers and his platoon officer referred him to a fitness to work evaluation. He was assessed by Dr. Phillip Prendergast, at the time an occupational health physician with Health Canada. Dr. Prendergast testified that this first assessment took place in January 2001 and the diagnosis was of a mild form of depression. There was no extended time off work but the grievor used his sick time for short absences related to this condition. Dr. Prendergast emphasized in his evidence that the ". . . only impact at work was interpersonal struggles . . ." the grievor had with other employees.

[6] In a subsequent letter dated April 5, 2001, Dr. Prendergast noted that the grievor was facing some disciplinary measures at the time. He stated that he felt that ". . . clearly negligent acts by Mr. Schwartzenberger should be disciplined accordingly . . ." but "I also feel that he should be given some leniency in less significant matters that may have a connection with his medical condition." Dr. Prendergast stated the following in summary:

> *I feel that Mr. Schwartzenberger is medically capable of performing the duties of his job. He will continue to have interpersonal difficulties as a result of his medical condition, but this will improve over time. He is now under the care of a family doctor and is receiving treatment for his medical condition. I feel confident that his situation is now under good control, I plan to monitor this for the next several months.*

[7] On October 24, 2001, Dr. Prendergast wrote to the respondent to advise that the grievor was "quite well medically" and ". . . workplace issues have resolved reasonably well . . . ." Therefore, he wrote"[H]e is fit to work from a medical perspective," and the grievor had the ". . . knowledge and tools to help himself deal with co-workers in a healthy manner." Dr. Prendergast testified that by this time the grievor had his own personal physician who was also prescribing a low dose of an anti-depressant. This medication was stopped in August 2001, it was used again for another month, and then the grievor was off the medication by October 2001. By then he could "go solo." Dr. Prendergast also testified that he did not recall telling the grievor to exercise his own discretion about when to go to work as a result of his medical condition.

[8] The grievor testified that, after 2001, from time to time he could feel his condition "coming on". This depended on the severity, "sometimes it's just a bad mood and other times it is worse for sure." The grievor suggested that he had been off work

from time to time, between 2001 and 2005, for his condition although no dates were specified and there is no medical evidence about those absences.

**The respondent's decision to discipline the grievor**

[9] The events giving rise to the discipline of the grievor in this case took place in late 2005.

[10] In November 2005 the grievor and his common-law wife were undergoing a separation. According to the grievor's testimony, his previous medical condition was a factor in the separation. He said that, during this time, he "was not really happy, [he] was really down." He did not see his physician because "one of the issues I have is that I tend not to think." It is not entirely clear but I take from this that the grievor's view of his condition is that he acts without thinking about the consequences of his actions.

[11] The grievor testified that on Saturday, November 12, 2005 he spoke to his platoon officer, Gino Chicorelli, who was also a member of the bargaining agent. The grievor said that the conversation took place five years ago, he could not remember "the gist of it," but he was "not in a very good place." The grievor had previously confided in Mr. Chicorelli about his medical condition so Mr. Chicorelli knew the context for the grievor's comments. According to the grievor, he told Mr. Chicorelli that it would "be better if I not be at work for the next four shifts." His reasoning was that his medical condition in the past has led to conflict with his co-workers and it was better if he stayed away from work.

[12] At that time, some of the grievor's co-workers were organizing a trip to Vancouver to attend a hockey game. The game took place on Sunday, November 13, 2005, and it was probably a night game. In order to attend the game the people involved had to travel to and from Vancouver by a chartered bus (from Victoria) and they stayed overnight in a Vancouver hotel on November 13, 2005.

[13] Mark Crisp, a firefighter at CFB Esquimalt and a co-worker of the grievor, testified that he was the main person who organized the trip to see the hockey game. Approximately 35 tickets were sold, mostly to firefighters. Mr. Crisp testified that the tickets were sold out by early October but one of the people participating became sick and cancelled his ticket. Mr. Crisp knew that the grievor was off sick and he knew the general nature of the grievor's condition. As Mr. Crisp and other witnesses for the

bargaining agent told it, there was a sense among the grievor's co-workers that the trip to the hockey game with friends and co-workers would be good for the grievor's spirits.

[14] Mr. Crisp contacted the grievor and offered him the ticket from the person who cancelled. At first the grievor declined. However, other people contacted the grievor, including Mr. Chicorelli, and ultimately the grievor decided to go to the hockey game. Mr. Crisp testified that the grievor obtained his ticket the day before the game, Saturday, November 12, 2005. By all accounts the trip was a success and, according to Mr. Crisp, there was "normal drinking" of alcohol. The grievor testified that he drank four or five bottles of beer, but he could not say for sure the exact amount. The grievor testified that he eventually decided to go to the game because his friends and co-workers persisted; "basically they told me I had to go." He is normally "quite gregarious," but he was quiet during the trip. However, he felt better as his friends and co-workers included him in the activity.

[15] On Sunday, November 13, 2005, the day of the hockey game and the day that the group left Victoria, the grievor called in to book off sick. He was scheduled to work November 14, 15, 16 and 17, 2005. He testified that he did this because he could feel his medical condition "coming on." He "tends to get aggressive" as a result of his condition and "the fire hall is not the place for that because I get in trouble with the rank structure." The "sick book" recorded the grievor calling in at 09:35 on November 13, 2005 and it noted that the officer on shift was advised. Firefighters book sick leave on essentially an honour system, although the respondent has the right under the collective agreement to request a medical certificate. The evidence is that employees generally call in themselves and tell the person managing the sick book when they will be sick. This is usually done the same day but the practice appears to be that it can be done the day before the shift booked off. The evidence is unclear about whether the grievor advised the respondent on November 13 that he would be away for four days or just the one day; the sick book records only one shift booked off.

[16] When the grievor returned from the hockey game on Monday, November 14, 2005, he "felt better" and decided that he could return to work the next day, November 15, 2005. Early on the morning of November 15, the grievor called in to work to advise that he would be coming in that day. He testified that he was assigned to a different location than usual, Rocky Point. He testified that he was given

“unofficial” light duties because of his medical condition, meaning that he could arrange with his supervising officer informally for light duties. Mr. Chicorelli testified that there are no light duties at Rocky Point.

[17] On November 16, 2005, the grievor was on annual leave. He was on sick leave on November 17, 2005. His next rotating shifts were on November 24, 25, 26 and 27, 2005. For those shifts, he was off sick on November 24, he worked at Rocky Point on November 25 and 26, and he was off sick on November 27, 2005. The shift rotation before November 14, 2005 was six shifts for the period from November 4 to 9, 2005, and the grievor worked them all.

[18] On December 7, 2005, the grievor completed a "Leave Application and Absence Report" to record his sick leave. He described being off sick for 10 hours on November 14, 2005, and he signed a declaration that "I declare on my honour that due to illness or injury, I was incapable of performing the duties of my position during the entire period of absence for which leave is requested as indicated.” On December 11, 2005, Mr. Chicorelli approved the leave by signing the form.

[19] Richard Mutas was Fire Chief at CFB Esquimalt in 2005. He testified that some months after November 2005, in the spring of 2006, it came to his attention that there had been discussions and concerns within the bargaining agent about some members using sick leave inappropriately. The grievor was identified as one of these people, among others. Mr. Chicorelli, the local union President at the time and a witness for the bargaining agent in this adjudication, took some exception to this. In his evidence he acknowledged there were “some comments” within the bargaining agent but “no one had been on sick time who should not have been.”

[20] Mr. Mutas, acting as fire chief, called the grievor in for a meeting. This was a “fact finding” meeting according to Mr. Mutas and there was no intent to discipline the grievor. It involved only the grievor and Mr. Mutas. According to Mr. Mutas he said to the grievor that he had heard that the grievor had gone to the hockey game and there had been some concerns within the bargaining agent about inappropriate use of sick time. Mr. Mutas also pointed out to the grievor that he (the grievor) was off sick the day after the hockey game. To this, according to Mr. Mutas, the grievor agreed he had gone to the hockey game and he agreed he had been drinking and he was in no condition to come to work because of the drinking, in Mr. Mutas’ words. Mr. Mutas also testified that the grievor did not refer to any medical reason for taking sick leave. The

meeting was quite brief and Mr. Mutas advised the grievor that he thought taking the sick leave was inappropriate. There was no discussion of discipline. Following the meeting the grievor went to the watch room where the sick book is kept to record people calling in sick. Mr. Mutas followed the grievor and took the book to protect it.

[21] According to the grievor's testimony, during the meeting he and Mr. Mutas did not talk about the grievor calling in sick. They only talked about the hockey game but the grievor could not recall if he told Mr. Mutas that he was drinking at the game. The grievor agreed that Mr. Mutas followed him down after the meeting and retrieved the sick book.

[22] Following his interview with the grievor Mr. Mutas set in train an investigation to be conducted by Steve Mullen, the Deputy Fire Chief. The grievor was formally advised of this in a memorandum dated March 24, 2006, from Mr. Mullen. The grievor was told that ". . . you are alleged to have misconducted yourself, in that you utilized Sick Leave inappropriately." An investigative meeting was held on April 4, 2006 and in attendance were the grievor, Mr. Mullen, Mr. Chicorelli (on behalf of the union and representing the grievor) and Judith Murty, a Human Resources Officer.

[23] There is some dispute about what happened at the April 4, 2006 meeting. The respondent submitted notes that were apparently taken by Ms. Murty but she did not testify in this hearing. As well, the portion of the notes relating to that meeting are not verbatim and the notes include a number of matters that did not take place at the April 4, 2006 meeting.

[24] According to the testimony of Mr. Mullen, during the meeting the grievor was "evasive" and "not forthcoming" about issues such as whether he went to the hockey game and how he got there. According to Mr. Mullen, the grievor was "playing games" because he repeatedly refused to answer direct questions until he finally admitted he was at the hockey game and he took the bus with everyone else to get there. Mr. Mullen testified that he believed that the grievor was not being truthful because he applied for sick time to be at the hockey game but he was not sick. Mr. Mullen knew from interviewing Mr. Mutas that the grievor had initially said that the reason he was off work on November 14, 2005 was because he had too much to drink. However, in the April 4, 2006 interview, the grievor said to Mr. Mullen that he had an underlying medical condition and that is why he called in sick on November 13, 2005. According to Mr. Mullen that was a "conflict right away." Mr. Mullen was concerned that the

grievor's change of story was "too convenient and too pat," and it raised the question about whether the medical condition or the consumption of alcohol while at the hockey game was the reason for being off work.

[25] With regards to the medical condition itself, according to Mr. Mullen, the grievor said at the meeting that he could feel the onset of symptoms. As well, the grievor said that, based on his doctor's advice and his own research, it was better to stay at home than to create issues with other people at work. However, Mr. Mullen testified that he knew the grievor had a rib injury as a result of a WCB claim and the reference to a previous medical condition could be any number of things including this rib injury. Mr. Mullen denied that the grievor referred to his medical condition as described by the 2001 letter from Dr. Prendergast.

[26] In his evidence, the grievor testified that he had already told the fire chief, Mr. Mutas, that he went to the hockey game. In his mind, the issue at the April 4, 2006 meeting was how he could go to a hockey game and not work the next day. He also testified that he told Mr. Mullen that "[t]here are many reasons for not attending work including having a broken leg and being drunk the night before. [Mullen] said how can you be off work one day and not the next and I said there are many reasons."

[27] On April 24, 2006, Mr. Mullen prepared a briefing note for P. C. Leblanc, the Commander, CFB Esquimalt. Among other things, the note included the following:

> *From the very first question Mr. Schwartzenberger was evasive claiming he could not remember various details surrounding his actions as they relate to this incident. After repeated questioning he admitted he had been at the game and had too much alcohol to drink, as a result he said he was off sick on the 14th of Nov. 2006. When I asked him why he called in sick almost 24 hrs. prior to his scheduled to work shift, he responded it was because of a medical condition. At this point I assured Mr. Schwartzenberger I was not enquiring about confidential medical information, he said he understood. However he said, one of the symptoms of this medical condition is that he can feel and anticipate the onset of this condition. He said he was advised by his doctor and through his own research, that when he feels the onset of this condition he should not isolate himself and self medicate (alcohol). That in fact he must make an effort to get out and socialize and interact with other people. His explanation for calling in sick almost 24 hrs. early was he anticipated he would be sick because of the symptom he was feeling and would not be fit for work. He alluded to previous disciplinary*

> *issues and personality clashes with various coworkers, which he attributes to this condition. As a result he determined that it would be in his best interest to remain away from the work place until the symptoms had passed.*
>
> *As the interview progressed he refuted his own tenuous explanation above, by making the admission that he drank too much alcohol the night of the 13th Nov. 06 and was in no condition to come to work on the 14th Nov. 06.*
>
> *A footnote, Mr. Schwartzenberger after receiving his Letter of Alleged Misconduct requested and was granted permission to inspect his personnel file both at CivHr and Fire Hall. He was looking for a letter from Dr. Pendergrast that would substantiate his claim that symptoms of his medical condition as outlined above were credible and based on a medical diagnosis. Mr. Schwartzenberger found no letter! Just prior to the end of the interview Mr. Schwartzenberger made a defiant statement that as a result of this "medical condition" I could expect him to use a lot more sick leave in the future.*
>
> *CONCLUSION*
>
> *Based on the results of my investigation I find that Mr. Schwartzenberger utilized Sick Leave inappropriately. In addition, during the course of the investigation he was evasive and at times defiant.*
>
> [*Sic* throughout]

Mr. Mullen recommended that the grievor be ". . . disciplined commensurate with the misuse of leave and actions he undertook to deceive fire department management," among other things.

[28] On June 7, 2006, Mr. Leblanc wrote to the grievor advising him that he was suspended for two shifts without pay for inappropriate use of sick leave. The letter noted that the grievor explained to Mr. Mullen that he had a medical condition but "[y]our personnel file revealed no evidence of the medical condition that you described."

[29] Mr. Leblanc also testified in this adjudication. He described the factors leading to his decision to discipline the grievor for two shifts as: the grievor's previous discipline of a one day suspension in 2006, the advice he received from human resources staff as well as the recommendation by Mr. Mullen following his investigation. With regards to the grievor's underlying condition, Mr. Leblanc testified

that he did not know of any particular medical condition of the grievor and, for example, he did not see Dr. Prendergast's letter of April 5, 2001, until the day before the hearing of the grievor's evidence (i.e., September 27, 2010).

[30] The grievor filed a grievance related to the discipline set out in Mr. Leblanc's letter. According to the grievance there were problems with the timeliness of the investigations as well as the findings and the discipline was punitive in nature. The corrective action requested was that the sick leave for November 14, 2005 be granted and that "all punitive actions" be withdrawn. During the hearing of this grievance, the bargaining agent sought a make-whole order as well.

[31] On September 27, 2006, Mr. Leblanc wrote to Dr. Prendergast to seek his opinion as to whether Dr. Prendergast's previous recommendation for leniency in dealing with the grievor's misconduct should still stand. This development appears to have come out of the grievance procedure and Mr. Leblanc acknowledged in cross-examination that he had not done this as part of his original decision. He also said that it was open to him to change his mind if the information from Dr. Prendergast supported a different decision.

[32] Dr. Prendergast conducted a second fitness to work evaluation on October 4, 2006, and he wrote a report dated October 13, 2006. I will reproduce all of that report, except for the first paragraph as follows:

. . .

> *I was asked to see Mr. Schwartzenberger in relation to his alleged misuse of sick leave in November of last year, when he went to a hockey game in Vancouver. It is not my role to determine whether sick leave has been used appropriately or not; this is a management function. It is important for me however to establish the context that was established by any medical conditions that Mr. Schwartzenberger may have been experiencing at the time.*
>
> *In interviewing Mr. Schwartzenberger, I learned that he had just gone through a difficult time with his common-law spouse, prior to his attendance at the hockey game. It is reasonable to believe that, at that time, he experienced a flare in a pre-existing medical condition, one that was diagnosed at the time of his previous Fitness to Work Evaluation in January of 2001. This condition had been under good control over the past several years. I do not believe that the flare was all that serious, however Mr.*

> *Schwartzenberger felt that he was justified in taking sick leave for this, and he stated to me that he did let his Assistant Fire Chief about* [*sic*] *the possibility of his missing work, when he expected to return on day shift.*
>
> *Mr. Schwartzenberger's medical condition became worse over the subsequent months, and he attributes this to several episodes of confrontation with his managers at work. As a result, he has recently sought help from his doctor and is undergoing treatment for his condition. Since initiating treatment, he has begun to feel better, and I find no reason to believe that he should not be capable of working in his substantive job, once his rib injury heals sufficiently.*
>
> *In your letter of referral, you made reference to previous recommendations by me for leniency in dealing with this employee on matters of misconduct. In reviewing my letter of April 5, 2001, I see I had made such a recommendation, but I believe I was referring to matters of an interpersonal nature and not purely administrative matters such as the use of sick leave.*
>
> *In closing, I would like to state that my recommendations should not be construed as a means for Mr. Schwartzenberger to escape accountability for his actions. My intent in this letter has been to establish any current limitations regarding Mr. Schwartzenberger's fitness for work and to provide a context for the situation Mr. Schwartzenberger was facing when he is alleged to have misused his sick leave. It is now a management responsibility to establish the appropriateness of his actions at that time. I would be happy to offer further information or advice in your efforts to do so.*

[33] On November 10, 2006, Mr. Leblanc wrote to the grievor to advise him that the penalty had been reduced to a ". . . fine equivalent to two shifts of pay." The reasons for this reduction arose from the grievance procedure and are, therefore, confidential. With regards to the second Fitness to Work Evaluation in October 2006, Mr. Leblanc stated that he was "of the opinion that whereas your medical condition may cause you difficulty from time to time, it is not reasonable justification for booking off sick at your own discretion." In his evidence, Mr. Leblanc confirmed that nothing in Dr. Prendergast's letter of October 13, 2006 changed the substance of the original decision to discipline the grievor.

**Pre-hearing disclosure of medical records**

[34] Prior to this hearing, the respondent applied for pre-hearing disclosure of the medical records of the grievor. This application was heard by means of a conference call on September 20, 2010. The application was opposed by the grievor and the bargaining agent for privacy reasons.

[35] I concluded that the grievor was relying on his medical condition as the reason for his absence from work on November 14, 2005. Any medical records related to that time were relevant, and the respondent was entitled to review any records, subject to some strict restrictions to address privacy concerns.

[36] On September 22, 2010, the Public Service Labour Relations Board ("the Board") issued an order for disclosure of the grievor's medical record in the following terms:

> *Further to the pre-hearing teleconference of September 20, 2010, in the above-noted matter, Adjudicator Steeves heard the respondent's application for disclosure of medical documents related to the grievor's medical condition in October, November and December 2005.*
>
> *The context for this application is the employer's allegation that the grievor used his sick leave inappropriately on November 14, 2005. The bargaining agent and the grievor opposed this disclosure because of the private nature of medical information about the grievor.*
>
> *Pursuant to paragraph 226(1)(e) of the* Public Service Labour Relations Act*, I hereby order the following:*
>
> *1. Any persons or organizations holding medical records (including chart notes) related to Mr. Jeff Schwartzenberger (the "grievor") will forthwith provide the grievor and his bargaining agent with such records, for the period October 1 to December 31, 2005.*
>
> *2. The bargaining agent will provide copies of these records to counsel for the Employer as soon as possible, bearing in mind the hearing dates of September 28-30, 2010 and the need for the Employer to prepare its case.*
>
> *3. Prior to receipt by the Employer and the union of the records in question, they will each put in place procedures to protect the confidentiality of this information. This will include: limitations on who has access to the information, where it is kept, restrictions on copying, restrictions on distribution and final storage/ destruction. Particular care*

> *should be given to information that is clearly not relevant to this grievance, and,*
>
> *4. The records disclosed will be used only for the purposes of this arbitration proceeding, related appeals or related judicial review proceedings.*
>
> *Furthermore, Adjudicator Steeves also directs, pursuant* [sic] *section 226 of the PSLRA, that the respondent and bargaining agent exchange, as soon as practicable, documents and other information that may be relevant to this matter.*

[37] At the beginning of the hearing, on September 28, 2010, I was advised by representatives for the respondent and the bargaining agent that no medical records from the grievor's physician existed that were relevant to these proceedings. Therefore, there were no documents from the grievor's personal physician and nor was this doctor being called as a witness.

[38] However, during cross-examination of the grievor, he was questioned by counsel for the respondent about not seeing his physician in early November 2005. He agreed he had not seen his doctor but then he said he had seen him in late November or early December 2005. Counsel for the respondent questioned that statement because no medical records had been disclosed under the pre-hearing order. The grievor testified that he "did not get the documents" from his doctor because it "takes three to four weeks to get an appointment." The grievor also stated that he had not disclosed to the doctor that there was a legal order requiring the production of the medical records.

[39] That development halted the evidence. In a discussion with both representatives, I suggested to the respondent that I would grant an adjournment to allow it to obtain any medical records or to confirm that there were no such documents. After consideration, the respondent decided not to request an adjournment. Instead, it submitted in argument that I should draw a negative inference from the grievor neglecting to obtain his medical records, as required in the pre-hearing order.

**Reasons**

[40] As stated above, the issue in this case is whether the respondent had just cause to impose a two-day suspension on the grievor for the inappropriate use of sick leave. Essentially, this comes down to a factual issue as to whether the grievor was sick

during the period of November 13 to 15, 2005. As the respondent concedes, if the grievor was genuinely sick during that period, then the grievance must be allowed.

[41] I will begin by addressing a submission from the grievor and the bargaining agent about the “Leave Application and Absence Report” that the grievor completed on December 7, 2005 and that Mr. Chicorelli, his platoon officer, approved on December 11, 2005. Again, the grievor's signature on this form was his declaration that he was incapable of performing his duties on November 14, 2005 because of his illness. According to the bargaining agent this form is a complete answer to the respondent's concerns about the issue of the grievor's use of sick time. This is because of clause 36.03 of the collective agreement between the parties (expired on August 4, 2007) and I set out that provision as well as clause 36.02 as follows:

> *36.02 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 a manner and at such time as may be determined by the Employer,*
>
> *and*
>
> *(b) he or she has the necessary sick leave credits.*
>
> *36.03 Unless otherwise informed by the Employer, a statement signed by the employee stating that because of illness or injury he or she was unable to perform his or her duties shall, when delivered to the Employer, be considered as meeting the requirements of paragraph 36.02(a).*

[42] The bargaining agent submits that the “Leave Application and Absence Report” completed by the grievor is a "statement" of illness as required by clause 36.03 of the collective agreement. Once that document was completed, the grievor’s entitlement was established, and it cannot be revoked. Furthermore, if there is any doubt of this, the form was approved by the grievor’s platoon officer, Mr. Chicorelli, and no one questioned Mr. Chicorelli about the grievor's leave. The bargaining agent’s submission relied on the following decisions: *Pinard v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-17528 (19890405); *Kuderian v. Treasury Board (Revenue Canada - Customs & Excise)*, PSSRB File No. 166-02-18982 (19900122); *Elliott v. Treasury Board (Employment and Immigration Canada)*, PSSRB File No. 166-02-23225 (19930525). For example, in *Kuderian*, the adjudicator was considering a provision essentially the same

as clause 36.03 in this case. At page 6, the adjudicator noted that, although he had ". . . grave doubts as to the nature of the grievor's illness . . . ."

. . .

> *I must give the above clause its clear meaning; this is a well-established principle in contract interpretation, and I cannot ignore it here. My interpretation of this clause is that the respondent does not have the right to challenge an employee's claim for sick leave once that employee has signed a statement as required by [the clause] . . . .*
>
> . . .
>
> *It is obvious the request for sick leave is dependent on the integrity of the employee, and the respondent has no alternative but to accept the request provided it meets the requirements of [the clause]. . . .*
>
> . . .

[43] In my view there are two problems with this submission. First, the grievance does not rely on the application or interpretation of clause 36.03 of the collective agreement. Making this submission during argument, as it was, amounts to making an amendment of the grievance without the respondent having the opportunity to present evidence on the issue.

[44] Second, and more significantly, I have read the decisions relied on by the bargaining agent. I agree with the general proposition that sick leave is dependent on the integrity of the employee making the request and in most cases, the respondent does not have the right to challenge the claim of illness or injury once the employee signs the "Leave Application and Absence Report." However, clause 36.03 of the collective agreement also states that this is subject to the employee being "otherwise informed by the Employer" that the leave does not meet the requirements of the collective agreement. One of those requirements is that the employee is to satisfy the respondent of his condition in such a manner and at such a time as maybe determined by the respondent. That is, the respondent is entitled to inform an employee that there are problems with the basis of a claim for sick leave. One possible result of this exchange is that the respondent may decide that the requirements of clause 36.02 have not have been met by the employee making the claim. It follows that I disagree with the bargaining agent and the grievor that, in every case, all that is required under the

collective agreement to establish entitlement to sick leave is for the employee simply to fill in the appropriate form.

[45] Nor do I agree with the bargaining agent and the grievor that the signature of a supervisor approving the leave is always final and conclusive proof of the sick leave entitlement when subsequent events raise questions about the leave. Approval of the form is based on the information available at the time of approval and further information that subsequently comes to light may raise legitimate questions about the leave. Put another way, an employee can be "otherwise informed" about problems with a leave after it has been approved and after the leave has been taken. In fact this analysis and conclusion is confirmed in *Kuderian*; the quote in paragraph 42 above actually ends with the statement "unless the respondent is able to prove the signed statement to be fraudulent". That is a sensible approach, as well as being consistent with the collective agreement, since it would be a very unusual situation where an employee's statement about being entitled to sick leave must be taken at face value even when the statement was false.

[46] In this grievance, the respondent is challenging the basis of the grievor's claim for sick leave in November 2005. It is entitled to make this challenge under clause 36.03 of the collective agreement.

[47] I will turn next to a review of the medical evidence since the grievor maintains he was sick on November 14, 2005.

[48] There is little doubt that the grievor suffered from a mild form of depression in 2001. That is set out in Dr. Prendergast's letter of April 5, 2001. Dr. Prendergast confirmed the condition and provided more detail of it in his evidence. In his letter he suggested that some "leniency" be accorded to the grievor for ". . . matters that may have a connection with his medical condition" that would otherwise be disciplinable. Specifically, the concern was the grievor's interactions with his co-workers and how they might negatively affect "team morale and cohesion." In the same letter, Dr. Prendergast noted that there had been a "small improvement in his condition," that the grievor had been seeing his own physician and that "I feel confident that his condition is now under good control." The plan was for some monitoring "for the next several months."

[49] Dr. Prendergast wrote a second letter, dated October 24, 2001, in which he stated that "I feel it is time for me to end my follow-up of Mr. Schwartzenberger" because the grievor was ". . . doing quite well medically and . . . workplace issues have resolved reasonably well" and "[h]e is fit to work from a medical perspective." Further, the grievor ". . . now has the knowledge and tools to help himself deal with co-workers in a healthy manner." I conclude that there were minimal if any medical issues for the grievor as of October 2001. As Dr. Prendergast put it in his evidence, the grievor was ready to "go solo."

[50] It is significant that there is no other medical evidence until Dr. Prendergast's second fitness to work evaluation in October 2006 (discussed later in this decision), a considerable time after November 14, 2005. That is, there is no medical evidence from the grievor's personal physician about the grievor's condition between October 2001 and November 2005. The grievor testified that he was off work for "some days" during that period, but those days were not specified, and again, there is no evidence of any medical treatment during that time.

[51] Taken as a whole, I conclude that there is no medical evidence at all about the grievor's medical condition before November 14, 2005 (and after 2001). That is the grievor's own evidence. He testified that he saw his physician in late November or early December 2005, after he was off work on sick leave. I conclude that some negative inference about this evidence is warranted because the grievor was required to prove his medical treatment or visits between October 1 and December 31, 2005 by an order of this Board, pursuant to subsection 226(1) of the *Public Service Labour Relations Act*. He neglected to provide that proof, and I find his evidence unreliable about visits to his physician in late November or early December 2005.

[52] In any event, the grievor's evidence on this point is that he saw his physician on one occasion and he relies on this to explain his sick leave absence. However, he is vague as to the date as well as the reason for the visits and the medical advice that he may have been given. Finally, the fact that the grievor saw his physician after he took his sick day on November 14, 2005 also weakens the value of this evidence. Assuming that he saw his doctor in late November or early December, it can be inferred that no pressing need existed for medical attention on or about November 14, 2005.

[53] I will turn next to the grievor's second fitness to work evaluation. This the report prepared by Dr. Prendergast on October 13, 2006, almost a year after the sick

day taken by the grievor on November 14, 2005. With respect to the date of the evaluation, the grievor and the bargaining agent submit that a number of unacceptable delays have occurred in the investigation of the grievor's situation and in the second referral to Dr. Prendergast. The evidence is that the allegations about employees using sick leave inappropriately came to the respondent's attention in spring 2006. The respondent was entitled and, indeed, required to investigate the allegations, which it did within a reasonable time of learning of them. The investigative meeting was held on April 4, 2006, Mr. Mullen's report was made available on April 24, 2006 and the discipline against the grievor was imposed on June 7, 2006. I am unable to find any unnecessary delay in that chronology.

[54] The grievor and bargaining agent also take issue with the fact that the grievor was not given a fitness to work evaluation in November 2005. That would have been preferable for obvious reasons. However, the information before the respondent in November 2005 about the grievor's previous medical history was minimal at best. It is true that, as recorded in the respondent's documents, the grievor referred to a previous medical condition and he said he could tell when that condition was coming on. However, he had some obligation to provide details of his history. Specifically, he had a copy of Dr. Prendergast's letter of April 5, 2001, and for reasons that were not explained, he chose not to provide the respondent with a copy of it or even its particulars. There is some truth in Mr. Mullen's testimony that the grievor's reference to a previous medical condition could have been a reference to any previous condition, including a previous workers' compensation claim for a physical injury.

[55] The grievor and the bargaining agent's answer is that the grievor's previous medical history was well known by management and that it had the primary obligation to act on this history. However, the evidence is to the contrary. Because of privacy protections, management did not know about the grievor's medical history. Some managers did not know about it until this hearing. The grievor and the bargaining agent also question why Dr. Prendergast's letter of April 5, 2001 was not in the grievor's personnel file. The evidence included some speculation on this point and it also arose during argument. The April 2001 letter may have inadvertently not been placed in the file, or it may have deliberately been left out of the file for privacy reasons. Overall, the evidence does not explain why the letter was not in the grievor's file, and I cannot find that it is directly relevant to the issues in this grievance.

[56] Turning to the substance of the second fitness to work evaluation in October 2006, somewhat surprisingly, both the respondent and the grievor (through his bargaining agent) rely on the report to support their positions. The respondent submits that nothing new in the report required it to change its decision to discipline the grievor; the report essentially confirmed its decision. That was the evidence of Mr. Leblanc, the base commander. On the other hand, the grievor and the bargaining agent rely on Dr. Prendergast's statement that:

> *. . . [i]t is reasonable to believe that, at that time [the time of the hockey game in November 2005] he [the grievor] experienced a flare in a pre-existing medical condition, one that was diagnosed at the time of his previous Fitness to Work Evaluation in January of 2001.*

[57] For his part, Dr. Prendergast explained in his evidence that, generally, he is required to objectively assess the medical conditions of employees but that he has to "walk a fine line" and avoid being an advocate for either the respondent or the employee.

[58] I have reviewed Dr. Prendergast's evaluation of October 2006 with some care, and I agree with him that he walked a fine line without leaning to either side. However, it is my role to decide whether the grievor was sick on November 14, 2005, in light of all the evidence, including the expert evidence of Dr. Prendergast. I am not bound by Dr. Prendergast's opinions, but I am obliged to consider them with all the other evidence.

[59] In my view, it is of some significance that Dr. Prendergast testified that his 2006 opinion was based "strictly" on the information provided by the grievor at the evaluation in October 2006. That is, it was not possible because of the time that had passed to know the grievor's medical condition in November 2005. It is true that it was open to the respondent to seek an earlier opinion from Dr. Prendergast. But, as noted earlier in this decision, minimal information was available to the respondent about the grievor's history, and the grievor was not forthcoming about that history. In addition, it was open to the grievor to consult his doctor at that time. He testified that he did so after the material times but, as noted earlier in this decision, I have found his evidence on that point unreliable. Dr. Prendergast, in his evidence, understood that the grievor had not seen his physician at the material times. He concluded that any problem the grievor had was not serious. Furthermore, it was open to the grievor to tender in the

hearing of his grievance his own expert evidence from his physician about his condition at the material times. He did not.

[60] I am unable to place great weight on Dr. Prendergast's October 2006 opinion as to the grievor's condition in November 2005. Obviously, the grievor had and still has a particular account of his history and how it affected the event of mid-November 2005. Dr. Prendergast based his October 13, 2006 report on that account. Interestingly, Dr. Prendergast also stated, “I do not believe that the flare [sic] was all that serious” and that the grievor “felt he was justified in taking sick leave for this.” Again, the opinion is based on the grievor's view of things and what he felt was justified, rather than any medical findings.

[61] I also note Dr. Prendergast's comments in April 2001 that some "leniency" should be shown the grievor in his dealings with other employees and in the possibility of discipline arising from those situations. In his October 2006 report, and in his evidence, Dr. Prendergast went to some length to distinguish between the misuse of sick leave and “interpersonal struggles” or relationships between employees. By that he meant that the grievor was “accountable” for any misuse of sick leave and that his medical condition was not a basis to “mitigate his actions.” The medical condition affected the grievor's relationships with his co-workers, and it “should not result in an accommodation of the rules of the workplace.” In addition, it was management’s responsibility to “police the use of sick time and that is not my role.” At another part of his evidence, Dr. Prendergast testified that “the medical condition was not at the root of what he [the grievor] did,” and at another point, he said that “based on what happened to him [in November 2005]; it might lead to legitimate time off.” I attribute the contradictory nature of those statements to Dr. Prendergast's attempts to be balanced and credible to both the respondent and to employees. I prefer the former statement as a more accurate description of the grievor's situation in November 2005.

[62] Looking at all the evidence, I find that the following is an accurate description of what occurred in mid-November 2005 from a medical point of view. The grievor was understandably anxious as a result of a separation from his common-law wife. There may have been a return of some symptoms from the 2001 condition but not to the extent that medical attention was required. In general, medical support for the use of sick time is not required and the test is whether the employee can perform his duties. However, in this case, the respondent was concerned about inappropriate use of sick

leave and it was entitled to make inquiries about that concern. In response the grievor was entitled and, indeed, had some obligation to justify his absence with some legitimate explanation.

[63] Medical information is one way to fulfill that obligation (non-medical information is another way and this is discussed below). The grievor accepts this and he has attempted to say he saw his doctor but this was after the day of sick leave and he has neglected to provide medical information, even though ordered to do so by this Board. Finally, as Dr. Prendergast made very clear, the grievor's medical condition does not justify any leniency when it comes to the misuse of sick leave. In summary, there is no contemporaneous medical evidence about his condition, and therefore, it must be said that the evidence of a disabling medical condition in mid-November 2005 is scant at best.

[64] I will turn now to the evidence about the reasons for the grievor's absence from work on November 14, 2005. As noted earlier in this decision, the grievor said that he was sick on that day, while the respondent believes that he took the day off so that he could attend a hockey game in Vancouver.

[65] Mr. Mutas, Fire Chief at the relevant time, testified that the grievor told him that he was in no condition to come to work because he had been drinking the night before at the hockey game. This statement by the grievor was essentially spontaneous, albeit unguarded. In his evidence, the grievor stated that he could not remember whether he had made that statement. I find that he made the statement. I also accept Mr. Mutas' evidence that the grievor did not refer to any medical condition at their meeting.

[66] Then there is the investigative meeting of April 4, 2006, conducted by Mr. Mullen. I was urged by the respondent to use the notes of that meeting, taken by Ms. Murty. However, she did not testify, and her notes are not a verbatim account of the meeting. They appear to be her working notes, and it is difficult to discern from them what actually took place. In addition, the notes include a number of other statements clearly not related to the meeting. For those reasons, I find that the notes are not a reliable account of the meeting, and I decline to use them. Instead, I have used the evidence presented at the hearing. The evidence suggests that, during the April 4, 2006 investigative meeting, the grievor was more difficult than he had been in the meeting with Mr. Mutas. I accept Mr. Mullen's evidence that the grievor was evasive at the beginning of the meeting. Ultimately, he agreed that he went to the hockey game. The

grievor also attempted to refute his previous admission to Mr. Mutas that he had been unable to work because he had been drinking too much the night before, at the hockey game.

[67] I find that, at that point, the grievor understood that his statement to Mr. Mutas about drinking too much had created a problem for him, and his objective at the April 2006 meeting with Mr. Mullen was to be less cooperative and to try to eliminate that problem by presenting an alternate explanation for his absence. The alternate explanation was that he actually had been sick as a result of his previous medical condition. I do not accept that explanation. It is counter to the statement that the grievor made to Mr. Mutas, and in fact, the grievor did not mention a medical condition to Mr. Mutas. In addition, there is little medical evidence to support the idea of a medical disability in mid-November 2005. In my view, the situation was as the grievor stated to Mr. Mutas; he had had too much to drink the night before his shift on November 14, 2005, and he could not work on that day. I note that the grievor called in on November 13, 2005 to inform that he would be off sick on the next day, November 14, 2005. From that, I conclude that the grievor used a sick day to attend the hockey game and then had too much to drink. For obvious reasons, he could not disclose that to Mr. Mutas, and he apparently believed that an explanation based on alcohol use would suffice. It did not.

[68] A final matter is the two-day suspension given to the grievor for the inappropriate use of sick leave. The bargaining agent submits that, in the event that there is a finding of a misuse of sick leave, a lesser penalty is warranted. The grievor was given a one-day suspension in 2006 for a violation of the *Values and Ethics Code for the Public Service*. He apparently had an exchange with a co-worker, during which he asked the co-worker to "step outside." I acknowledge that the previous discipline might be seen as of a different character than the incident in this grievance. However, the misuse of sick leave is a serious employment offence on its own, sometimes described as "time theft." I also note that the grievor displayed no contriteness. Instead, he was evasive during the investigation. In light of those events and the one-day suspension just after the April 4, 2006 investigative meeting conducted by Mr. Mullen, I find that a two-day suspension is an appropriate penalty in the circumstances.

**Summary and conclusion**

[69] Generally, an employee does not need medical support for sick leave. What is required under the collective agreement is a statement by the employee that he or she is unable to perform his or her duties. However, if an employee is "otherwise informed" by the respondent there can be an inquiry by the respondent about whether the requirements of the sick leave provision (clause 36.02) have been met. One of those requirements is that the employee is to satisfy the respondent of the condition giving rise to the absence and in a manner and at such time as may be determined by the respondent. In response, an employee may, as in this case, rely on medical evidence to support the absence.

[70] I find that the grievor misused his sick leave to attend a hockey game in November 2005. He was candid about this in his meeting with Mr. Mutas in that he admitted that he had had too much to drink at the game and that he then could not work. In fact, he had booked the day off sick before starting to drink alcohol. In any event, the grievor's statement to Mr. Mutas is to be generally preferred as an accurate explanation of what happened.

[71] The grievor subsequently tried to avoid responsibility for his actions by relying on a medical condition from 2001. There is no medical or other evidence that that condition was of any significance from October 2001 to November 2005. Indeed, the only medical evidence is from October 2006. Although there is some support for the grievor's assertion of a disabling medical condition in that report, I find that it is strictly based on what the grievor told the doctor who wrote it.

[72] The grievor had the opportunity to present medical evidence about his medical condition throughout the respondent's investigation, and he chose not to. He similarly chose not to provide expert medical evidence from his physician at the hearing. He was actually required by an order of this Board to provide some material from his doctor, but he did not.

[73] Finally, in light of the circumstances of this grievance and the previous discipline in June 2006 of a one-day suspension, a two-day suspension is an appropriate penalty.

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

*(The Order appears on the following page)*

**Order**

[75] The grievance is dismissed.

January 24, 2011.

**John Steeves,**
**adjudicator**